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The Legal Regulation of Adult Personal Relationships: Evaluating Policy Objectives and Legal Options in Federal Legislation

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May 1, 2000

This paper was prepared for the Law Commission of Canada under the title *"The Legal Regulation of Adult Personal Relationships: Evaluating Policy Objectives and Legal Options in Federal Legislation"*. The views expressed are those of the authors and do not necessarily reflect the views of the Commission. The accuracy of the information contained in the paper is the sole responsibility of the authors.

Ce document est également disponible en français sous le titre « L' assujettissement juridique des rapports personnels entre adultes : Évaluation des objectifs des politiques et des alternatives juridiques dans le cadre de la législation fédérale ».

EXECUTIVE SUMMARY

Few would dispute that adult personal relationships characterized by caring and commitment ought to be recognized and supported by the state because of their fundamental importance to the well-being of individuals and communities. The law has long sought to identify these relationships by reference to ties of blood, marriage or adoption. Contemporary norms, however, value adult personal relationships by reference to their qualitative attributes rather than their formal legal status. This shift in normative assumptions has accompanied profound shifts in Canadians' living arrangements over the course of the last thirty years. We have witnessed a decline in the marriage rate, and sharp increases in the rate of non-marital cohabitation, divorce, non-marital and single-parent child rearing.

In seeking to recognize and support adult relationships of caring and commitment, the state should be guided by the fundamental values of autonomy, privacy, equality and security that are central to our constitutional and political traditions. Individuals should be free to choose whether (and with whom) to form personal relationships. The state should promote relational autonomy by avoiding policies that create pressure to abandon relationships of caring and commitment, or that accord preferential status to certain categories of relationships defined without reference to their qualitative attributes. The state ought to promote privacy by avoiding intrusion into peoples' homes and by avoiding legal rules that cannot be administered effectively without intrusive examinations into peoples' intimate lives. The state should promote equality by regulating adult personal relationships by reference to qualities that are relevant to legitimate state objectives. The values of equality and security require the state to seek to prevent exploitation and violence in personal relationships. Finally, the value of security requires that the state put in place an identifiable and accessible set of legal mechanisms to protect persons' reasonable expectations formed in adult personal relationships.

Existing federal legislation seeks to recognize and support adult personal relationships of caring and commitment through the pursuit of two legislative objectives. The first is the establishment of legal mechanisms for the formation and dissolution of relationships. Currently this is accomplished primarily through the law of marriage and divorce. The second objective is to respond to the consequences of relationships characterized by emotional and economic interdependence. This objective manifests itself at every stage of the evolution of adult personal relationships. The state has an interest in supporting the integrity and security of ongoing relationships of caring and commitment, and recognizing the value of caregiving provided in those relationships. The state has an interest in protecting people from violence and exploitation to which they may be particularly vulnerable in personal relationships. The possible existence of shared economic interests arising in relationships of caring and commitment is relevant to many state objectives in the context of the regulation of economic transactions. The economic and emotional interdependence that characterizes adult personal relationships can be disrupted by a number of events such as injury, illness, retirement, death or relationship break down. The state has an interest in cushioning the impact that the sudden loss of emotional and economic support can have on persons in relationships of caring and commitment, and in ensuring an equitable distribution of economic entitlements on the break down of a relationship.

After summarizing existing federal statutes that employ relational terms, and categorizing them according to the relational objectives they pursue, this report pursues the question of how to reform these statutes to better support relationships of caring and commitment in a manner that promotes the values of autonomy, privacy, equality and security. The report pursues this inquiry in two stages. The first is to ask whether the relational objectives underlying particular statutory schemes are still compelling. If not, the statutes should be repealed or the relational terms removed. Second, if a statute is pursuing a legitimate relational objective, the question is how to go about defining the relationships to which it ought to apply.

The report identifies a number of laws that do not effectively pursue legitimate relational objectives. These include the rules on spousal testimonial competence and compellability in the *Canada Evidence Act*, the monthly allowance provisions of the *Old Age Security Act*, the anal intercourse provision of the *Criminal Code*, and the insurable employment provisions of the *Employment Insurance Act*. In each of these contexts, the current legislative provisions employing relational terms do not pursue legitimate relational objectives in a coherent and compelling manner. Other statutes employing relational terms require considerable revision to eliminate the dated or questionable assumptions on which they rely. The guaranteed income supplement provisions of the *Old Age Security Act*, the duty to provide necessaries of life provision of the *Criminal Code*, and the wrongful death provisions of the *Canada Shipping Act* are examples of statutes in need of revision to bring them into line with contemporary relational norms and expectations.

Federal statutes have employed a remarkable diversity of relational terms to accomplish their objectives. These relational terms have been restricted, for the most part, to capturing relationships flowing from ties of blood, marriage or adoption. Until recently, with the exception of pension and tax statutes, federal statutes did not recognize persons cohabiting outside marriage. The *Modernization of Benefits and Obligations Act*, passed shortly after the completion of this report, will add a new definition - "common law partner" - to the vast majority of federal statutes. Cohabiting couples, whether of the same or opposite-sex, will qualify as common law partners if they have lived together for at least one year in a conjugal relationship. Conjugality is now the marker that determines which unmarried, cohabiting adult couples will be included within federal legislation.

The report suggests that using conjugality as a central feature of the new relational definition has a number of disadvantages. The distinction between conjugal and non-conjugal relationships is an elusive one. The conjugality requirement may result in inquiries into matters, such as the partners' sexual lives, that bear no relationship to legitimate state objectives. It may be possible to draft a legislative definition that focuses solely and more effectively on the existence of the three

qualitative attributes that are normally relevant to legitimate state relational objectives, namely, shared residence, emotional intimacy and economic interdependence.

The *Modernization of Benefits and Obligations Act* takes important steps forward in implementing the principle of relational equality in federal statutes. It does so, however, by relying on the ascribed or imposed status of "common law partner". The values of equality, autonomy, privacy and security could be significantly advanced if the state would broaden opportunities for persons living together to choose to formalize their relationships. This could be accomplished in two ways: by removing the legal bar to same-sex marriage, and by implementing a domestic partnership regime.

A careful analysis of the most recent judicial rulings on the equality rights in the *Charter of Rights and Freedoms* reveals that the opposite-sex definition of marriage is vulnerable to constitutional challenge. A government committed to meeting its constitutional obligations, and to supporting relationships of caring and commitment, ought to remove the opposite-sex component from the legal definition of marriage.

Whether or not the definition of marriage is amended in the future, the federal government ought to enact a domestic partnership law that would enable any two adults to register as partners for the purposes of federal laws and policies. Federal statutes should then be amended to accord registered domestic partners the same package of rights and obligations as spouses. A domestic partnership law would promote the equality and autonomy of non-conjugal cohabitants by permitting them to subscribe to the full package of spousal/ partnership benefits and obligations from which they are currently excluded. Even for unmarried couples living together in conjugal relationships, a registered domestic partnership option would present a number of advantages over the current legislative scheme: it would enable them to avoid the delays, uncertainties and potentially invasive inquiries generated by the administration of the definition of common law partner.

A domestic partnership regime is the best way to address the needs of non-conjugal cohabiting couples who are currently excluded from relational definitions in many federal statutes. Whether non-conjugal cohabitants who choose not to register as partners ought to be included in

federal laws can only be answered on a statute-by-statute basis. The report argues that there is a compelling basis for subjecting non-conjugal cohabitants to the *Criminal Code* duty to provide each other with the necessaries of life. Similarly, non-conjugal cohabitants should be included in the *Immigration Act*'s sponsorship provisions. They should be able to invoke the testimonial privilege that is attached to private communications by the *Canada Evidence Act*. On the other hand, to accord to non-conjugal unregistered cohabitants a right to a division of pension entitlements, or a right to claim pension survivor's benefits, runs the risk of undermining their autonomy and reasonable expectations.

BIOGRAPHICAL NOTES

Bruce Ryder is an Associate Professor at Osgoode Hall Law School where he has taught since 1987 after clerking for Justice Gerald Le Dain of the Supreme Court of Canada (1984-85), and after receiving an LL.M. from Columbia University (1987) and an LL.B. from the University of Toronto (1984). He served as Editor-in-Chief of the Osgoode Hall Law Journal from 1997-2000, and teaches courses in Constitutional Law, Canadian Federalism, Torts, and Sexuality and the Law. He is a constitutional expert whose published articles focus on equality rights, freedom of expression, Aboriginal rights, and federalism. He has published a number of articles on the legal status of same-sex couples, including "*M* v. *H*: Time to Clean Up Your Acts", with B. Cossman, (1999) 10(3) Constitutional Forum 59; "*Egan v. Canada*: Equality Deferred, Again", (1996) 4(1) Canadian Labour & Employment Law Journal 101; "Becoming Spouses: The Rights of Lesbian and Gay Couples", in *Law Society of Upper Canada Special Lectures 1993: Family Law* (1994); "Family Status, Sexuality and the Province of the Judiciary: The Implications of *Mossop v. A.-G. Canada*", (1993) 13 Windsor Yearbook of Access to Justice 3-38; "Equality Rights and Sexual Orientation: Confronting Heterosexual Family Privilege", (1990) 9 Canadian Journal of Family Law 39-97. In addition, he and co-author Professor Brenda Cossman prepared a research report for the Ontario Law Reform Commission in 1993 entitled *Gay, Lesbian and Unmarried Heterosexual Couples and the Family Law Act: Accommodating a Diversity of Family Forms* (Toronto: OLRC, 1993). He is currently researching a book on the history of the censorship of publications in post-war Canada. Part of this research is reported in his article "Undercover Censorship: Exploring the History of the Regulation of Publications in Canada", in K. Petersen and A.C. Hutchinson eds., *Interpreting Censorship in Canada* (Toronto: University of Toronto Press, 1999).

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PREFACE

We would like to acknowledge the excellent research assistance provided by Amanda Kushnir (Osgoode Hall Law School, Class of 2001), Tiffany Turnbull (Osgoode Hall Law School, Class of 2002), Jessica Smith (University of Toronto, Class of 2001) and Jennifer Guy (University of Toronto, Class of 2000). Many thanks also to Lisa Hitch of the federal Department of Justice in helping us come to a better understanding of federal pension statutes and the amendments proposed by Bill C-23. We are especially grateful to Tom Anderson of the British Columbia Law Institute for making available to us the impressive database he is compiling for the Law Commission. We cannot imagine how we could have completed this report without access to the comprehensive compilation of federal statutory provisions that employ relational terms assembled in Tom Anderson's database. Any errors that remain are our responsibility.

A note on the scope of our project: we have endeavoured to provide an overview of existing federal legislation regulating adult personal relationships, and we have attempted to address the most significant law reform issues through a general normative analysis and a close examination of selected statutes. The regulation of relationships between children and parents or other adults is beyond the scope of this study. Nor does this report present a comprehensive examination of every federal statutory provision that employs adult relational terms. We have tried to convey an accurate general picture through a reasonably comprehensive survey. We have left tax laws aside, in deference to Aboriginal peoples rights to articulate and implement distinct normative frameworks for the governance of their communities, we have chosen not to discuss federal laws, like the *Indian Act*, that apply specifically to Aboriginal peoples.

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INTRODUCTION

Two individuals have lived together for fifteen years. They have a joint bank account to pay for household expenses. They own their house jointly. They have a close emotional relationship. They share meals. They care for each other through illness and other hardships. They attend social and community events together. They have come to depend on each other for all of these things, and have no intention of changing the interwoven nature of their lives. How should the state treat these individuals? Should their relationship be included in rules regulating personal conflicts of interest? Should they have a legal obligation to provide for each other's basic needs? Should the state provide financial relief if their household income is suddenly diminished as a result of disability, retirement or death? Should their entitlement to income-tested social assistance be calculated by reference to their combined household income? If their relationship breaks down, should they be able to claim support from one another? If one of them dies, should the other be able to claim benefits from the deceased's employment pension plan or sue the person whose negligence was responsible for the death?

The answer to these questions has long revolved around whether the two individuals were married. If they were married, then they would be included within the broad web of legal regulation that imposed benefits and obligations. If they were not married, they remained outside of this web of regulation. Their entitlements depended on their status. Over the course of the last twenty-five years, Canadian legislatures have increasingly included unmarried opposite-sex couples within laws dealing with relational benefits and obligations, if they were cohabiting in a "conjugal" or marriage-like relationship. If two individuals were of the opposite sex, living in a conjugal relationship (which although elusive, in the past seemed to involve amongst other factors, a sexual relationship), then they would be entitled to a few federal benefits and obligations, but would have remained excluded

from many others. If they were of the same sex, they would have been excluded. And if they were not living in a conjugal relationship, they would be excluded.

With the impending enactment of Bill C-23, the *Modernization of Benefits and Obligations Act,*[1] most benefits and obligations in federal statutes will be extended to both same-sex and opposite-sex couples if they are living in a conjugal relationship. So, in the case of the two individuals we described above who share so many aspects of their lives, they will be entitled to most federal benefits and obligations if they have lived together in a conjugal relationship for at least one year. If they are not living in a conjugal relationship, they will remain largely outside of the web of federal regulation of adult personal relationships.[2]

Of course, all of this begs the basic normative question of whether the individuals *should* be included. Should the legal regulation of adult personal relationships depend on marital or marital-like status? Should individuals in non-conjugal relationships be more extensively included within this legal regulation? What is the basis of the distinction between conjugal and non-conjugal couples? Should inclusion within the web of legal regulation depend on the existence of a sexual relationship? As we will explore in considerable detail, it is no longer clear that the legal distinction between conjugal and non-conjugal couples revolves around the existence of a sexual relationship. And if sexual intimacy is not the defining feature of a conjugal relationship, then what is the basis of the distinction? If two individuals live together in a relationship of economic and emotional interdependence, should they be included within the web of legal regulation, regardless of their "conjugal" status?

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[1] Bill C-23, *An Act to modernize the Statutes of Canada in relation to benefits and obligations*, 2nd Sess., 36th Parl., 2000 (as passed by the House of Commons April 11, 2000). At the time of writing (May 2000), the Bill is being considered by the Senate Standing Committee on Legal and Constitutional Affairs. It is likely that the Bill will soon receive Royal Assent. We have prepared this report on the assumption that the amendments proposed by Bill C-23 will soon be a part of federal statutes.

[2] They may fall within federal statutes that employ terms such as "dependant" or "related person" and define those terms broadly to include non-conjugal cohabitants. At the moment, federal statutes that embrace non-conjugal cohabitants are relatively few in number. They do not include the most significant laws extending benefits and obligations in relational terms.

In this research paper, we explore all of these questions regarding the legal regulation of adult personal relationships. In order to answer these questions, we address two fundamentally interconnected issues: why should the state regulate these relationships, and which relationships should be included within this regulation? In the past, the state has assumed an active role in regulating the marital relationship. Over the years, this regulation has expanded to include a range of other adult relationships. Many legal entitlements and obligations have been extended to "marriage-like" relationships, that is, to unmarried persons living together in conjugal relationships. At the same time, some legal entitlements and obligations have been extended to other familial or familial-like relationships, including "dependants", "near relatives" and "related persons". The growing web of legal regulation of adult personal relationships has embraced a wider range of relationships in a haphazard, piecemeal fashion. While the expected passage of Bill C-23 (the *Modernization of Benefits and Obligations Act*) will bring a great deal more uniformity to the legal treatment of unmarried cohabiting couples in the federal sphere, federal legislation continues to approach non-conjugal familial relationships in an inconsistent manner. In some restricted spheres, non-conjugal relationships may qualify for benefits and obligations. More often, and in particular where direct financial support is at issue, these same relationships are not recognized.

There are a number of problems inherent in telling the story of the legal regulation of adult personal relationships. First, the very language we have used to tell the story may prove to be part of the problem. The terminology of "conjugal" and "non-conjugal", which in many ways sets the terms of the current debate, is increasingly problematic. As we discuss below, the distinction has always been elusive and it may be that the legal coherence of the distinction is collapsing.

A second and related problem in telling the story of the legal regulation of adult personal relationships is that the history of this regulation risks reinforcing marriage as the unstated norm against which other types of relationships are described, evaluated and judged. The story suggests that the process is one of expanding the concept of marriage or conjugality to include more and more relationships; of beginning with marriage as the centre, and of gradually expanding the

boundaries of marriage and conjugality to accommodate other types of relationships. It is a story in which marriage remains the unstated norm, and in which the legal recognition of other types of personal relationships is cast against this norm. It is a story that downplays the extent to which the web of legal regulation already recognizes other types of relationships, and the extent to which these relationships should also operate as a norm for describing and evaluating the range of adult personal relationships that ought to be included within legal regulation.

In the first part of this paper, we consider the general question of why the state should regulate adult personal relationships, and which relationships should be included within this regulation. We examine the values and objectives that have shaped or should shape Canadian laws regarding adult personal relationships. We map existing federal legislation onto these objectives, and we explore the range of relational definitions - spousal and familial - that are used to advance these objectives. In the second part of the paper, we consider whether these objectives are well served by existing relational definitions, or whether these objectives would be better served by more inclusive or more consistent definitions. We begin by examining various legal models for identifying and defining adult relationships, including marriage, ascribed spousal/relational status, and registered domestic partnership regimes. We then return to specific federal statutes and objectives, and consider which of the models of inclusion is most appropriate in particular legislative contexts. In our view, there is no one model that will satisfy all of the objectives of federal legislation. The solution lies in finding the particular combination of legal options that best furthers legitimate state objectives in particular policy contexts. Overall, however, we believe that federal legislation needs to be far more inclusive of the broad range of adult personal relationships to better reflect and respect the diverse ways in which Canadians structure their personal relationships. We will argue that the enactment of a registered domestic partnership scheme, and the addition of registered domestic partners to the web of federal regulation, is the best way for Parliament to address the problems of under-inclusion that have not been addressed by Bill C-23.

PART ONE

IDENTIFYING VALUES AND OBJECTIVES AND MAPPING EXISTING LEGISLATION

In the past, the State has assumed an active role in supporting the marital relationship. While many legal entitlements and obligations have been extended over the years to unmarried cohabiting couples, marriage – or a marriage-like relationship - has continued to be used as a proxy for the kinds of relationships that the state should support. The general question that this section will address is why has the state supported these marital and marital-like relationships? We examine the objectives that have shaped Canadian laws regarding personal relationships in the past, and the objectives that shape contemporary Canadian laws regarding personal relationships. We attempt to categorize and map existing federal legislation that employs spousal or other relational definitions on to the list of objectives we have identified. Finally, we illustrate the range of spousal and relationships definitions contained within federal legislation, and highlight the range of adult personal relationships that are excluded from these definitions.

I. Values and Objectives of State Regulation

The traditional objective of the state regulation of adult personal relationships has often been framed as one of promoting marriage. However, marriage over time has served many different objectives. In this section, we begin with a brief history of the legal regulation of marriage, in which we highlight these shifting objectives. We then turn to critique this 'traditional' objective, by examining the demographic changes in the ways in which Canadians live in families, as well as the legal and normative shifts that have accompanied these demographic changes. Finally, we examine

the underlying values that ought to animate and shape the state regulation of adult personal relationships. We conclude that marriage, although important, no longer captures the spectrum of adult personal relationships deserving of state regulation.

A. Traditional Objective of Promoting Marriage

1. A brief history of marriage and its shifting objectives

The history of the legal regulation of family relationships in Canada has been, as with other Western countries, a history of the centrality of marriage. English Canada inherited from England a legal tradition within which the institution of marriage was privileged over other adult relationships, and within which a range of status, rights and responsibilities were conferred exclusively on the basis of marriage. However, over the centuries, marriage has served many different purposes.

In Roman law, marriage was considered a largely private matter, in which the law did not involve itself to any great extent in the formation or dissolution of marriage. The status of marriage did have important legal implications: "the existence or nonexistence of a marriage was indirectly significantly for Roman law when it had to deal with problems involving membership of the 'houses' of which the body politic was composed, with succession on death, or with allocation of responsibility for civil wrongs".[3] However, Roman law accepted whatever local custom recognized as marriage. "Marriage was to the Romans, as to the other peoples of antiquity, a *de facto* rather than a *de jure* matter, in the sense that two people were held to be married, not because they had gone through any particular ceremony, but because they in fact lived together as man and wife. "[4] The dissolution of marriage – a generally accepted practice - was similarly governed by custom. However, Roman law did impose some limitations: it did not recognize marriages between free persons and slaves, or

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[3] Mary Ann Glendon, *The Transformation of Family Law: State, Law and Family in the United States and Western Europe* (Chicago: University of Chicago Press, 1989) at 21.

[4] Herbert Jolowicz, *Historical Introduction to the Study of Roman law*, 2nd ed. (Cambridge: Cambridge University Press, 1967) at 113.

at one time, between senators and other upper class men and women of lower class or rank.[5] Marriage, in Roman time, although not a formal legal institution, was very much about citizenship and property.

The modern day legacy of the strict legal regulation of marriage began to take shape with the rise of the Christian Church and its claim to exclusive jurisdiction over marriage. "The Church's claim to exclusive jurisdiction over marital causes and the novel idea that marriage was indissoluble were both closely connected to the Christian idea that marriage is not only a natural institution and a contract between the spouses, but also a sacrament, that is, a channel of divine grace."[6] The dominance of the ecclesiastical courts over matrimonial causes was in place in England by the middle of the twelfth century. Canon law established the indissolubility of marriage, and along with it, a complex web of regulations for more precisely defining marriage.[7] As part of the need to accommodate and assimilate local custom, up until the Council of Trent, the Church recognized both private, informal marriages and public, formal marriages. But, with the *Decree Tametsi*[8] in 1563, a public ceremony in the presence of a priest became a condition for a valid marriage. During this period, the legal regulation of marriage was very much about the Church's struggle for political and social control. While the religious and political objectives were obvious, the discrediting of informal marriages was also animated by more secular concerns. The new merchant class, increasingly concerned with controlling its wealth, was concerned with the financial implications of clandestine marriages. Many wanted the Church to impose parental consent requirements. While the Church did not impose this requirement, it did require that the ceremony now be public.

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[5] Glendon, supra note 3 at 21.

[6] *Ibid.*, at 23.

[7] As Glendon explains, "Out of this need came the whole complex canon law system of marriage impediments and prohibitions. The multiplication of these causes of nullity in turn led to the need to investigate in advance of marriage whether impediments in fact existed and thus to the origin of the publication of the banns and the Church's increasing insistence on public marriage, as well as to the elaboration of procedures for declaring marriages invalid." *Ibid.* at 27

[8] Council of Trent, 24th session, c.1.

In continental Europe, from the sixteenth to the eighteenth centuries, the jurisdiction over marriage was slowly transferred from the Church to the secular authorities, who "simply took over much of the ready-made set of rules of the canon law".[9] While the Reformation rejected the idea of marriage as a sacrament, its leaders did not question that marriage should continue to be governed by Christian principles.[10] The eighteenth century saw the rise of the codification of private law, which included extensive regulation of the formation, dissolution and content of marriage, and the emergence of compulsory civil marriage ceremonies.

In England, however, the Church of England maintained ecclesiastical jurisdiction well into the nineteenth century. Informal marriages remained valid until the passage of *Lord Hardwicke's Act* in 1753,[11] banning clandestine marriages, and setting out the basic requirements concerning the validity of marriage (such as age, registration, witnesses). The English common law was concerned with the integrity of the marital relationship. Through private law, it regulated entry into and restricted exit from marriage, as well as the economic consequences of marriage. The doctrine of marital unity established that "by marriage, the husband and wife are one person in law, that is, the very being or legal existence of the woman is suspended during marriage, or at least is incorporated and consolidated into that of the husband under whose wing, protection and cover she performs every thing".[12] The marital relationship was a highly integrated, economic relationship, in which the wife was legally and financially dependent on her husband. Issues of status and filiation were crucially important. The status of marriage conveyed not only social and legal status on spouses, but conveyed social and legal status on children, controlling property and inheritance. Civil marriage was only introduced in 1836 with the *Marriage Act*[13] and judicial divorce introduced in 1857 with the

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[9] *Ibid.* at 31.

[10] *Ibid.*

[11] (U.K.), 26 Geo. II, c. 33.

[12] Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (Chicago: University of Chicago Press, 1979).

[13] 1836 (U.K), 6&7 Will. 4, c. 85.

Matrimonial Causes Act.[14] The mid-nineteenth century also saw the passage of the *Married Women's Property Acts,*[15] whereby married women obtained independent legal personality.[16]

2. Marriage in the 20th Century

> By the turn of the twentieth century, Western family law systems had come to share, generally speaking, a common set of assumptions. Domestic relations law was organized around a unitary conception of the family as marriage-centred and patriarchal. Marriage was treated as an important support institution and decisive determinant of the social status of spouses and children. It was supposed in principle to last until the death of a spouse and was terminable during the lives of the spouses, if at all, only for serious cause. Family solidarity and the community of life between spouses were emphasized over the individual personalities and interest of family members. Within the family, the standard authority structure and pattern of role allocation decreed that the husband-father should predominate in decision making and should provide for the material needs of the family. The wife mother was to fulfil her role primarily by caring for the household and children. Procreation and child-rearing were assumed to be major purposes of marriage, and sexual relations within marriage were supposed to be exclusive, at least for the wife. Marriage, procreation, and divorce were supposed to take place within legal categories. Illegitimate children had hardly any legal existence at all.
>
> Mary Ann Glendon, *The Transformation of Family Law*

The idea of the conjugal family was, in the words of James Snell, "triumphantly popular" at the turn of the century in Canada. In terms that echo Glendon's description quoted above, Snell has described nineteenth century attitudes to the conjugal family as follows:

> Conceived as a single, uniform institution, it incorporated virtually all the principles and ideals valued by Canadian society. The family was the source of nurture and early training for children, of comfort and nourishment for weary men at the end of hard day's work, and of women's true fulfilment as wives and mothers.[17]

Marriage was the cornerstone of this conjugal family and "it was seen to be equally at the heart of Canadian society". Church and state joined together in sanctioning this family through the wedding ceremony.[18] Marriage was the basic social and legal institution for reproduction and child rearing. It

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[14] 1857 (U.K.), 20 & 21 Vict. c. 85.

[15] See for example, *Married Women's Property Act*, 1882 (U.K.), 45 & 46 Vict., c. 75.

[16] This legal legacy provided the framework for English Canadian law. At the time of Confederation, jurisdiction over marriage was divided. The federal government was given jurisdiction over marriage and divorce under section 91(26) of the *British North America Act* (now *Constitution Act*, 1867 (U.K.) 30 & 31 Vict., c. 3 reprinted in R.S.C. 1985, App. 2, No. 5) and the provinces given jurisdiction over the solemnization of marriage under section 92(12). At the time, divorce was available either through an act of parliament, or where available, through divorce courts, although the law varied from province to province.

[17] James Snell, *In the Shadow of the Law: Divorce In Canada 1900-1939* (Toronto: University of Toronto Press, 1991).

[18] *Ibid.* at 22.

was based on an ideology of separate spheres and a sexual division of labour, within which women were allocated the role of wives and mothers, "naturally" responsible for domestic labour and child care. Men, by contrast, as husbands and fathers, were responsible for supporting their families.

As Snell observes, this conjugal family "was central to contemporary images of the Canadian nation". And it was intricately tied to the project of building a national identity, and the role of the state was unquestionably one of supporting this family. "Over a vast area of authority and responsibility the state or its agents acted in various ways to support the idea of the family in its tangible expressions. Most directly these state activities were aimed at the maintenance of a particular form of the family: a family household dependent largely on men's wage labour and on women's domestic labour."[19] Policies on women and the family explicitly promoted this family and its sexual division of labour. Beginning as early as the 1880s, and continuing into the twentieth century, labour laws restricted women's labour force participation, thereby enforcing women's dependency on the family (though not for immigrant and working class women, who were encouraged into domestic employment).[20] Mother's allowances, initiated in 1916 in Manitoba, were designed to assist married women with dependent children who had been widowed or whose husbands were unable to provide for their families. It was designed to recognize that women who had been "appropriately" dependent on a male breadwinner would then fall into desperate economic circumstances upon the death, or disability of the breadwinner.[21] Its objective was to encourage these women to stay in the home, rather than enter the work force.[22] It was in effect seen as a "salary" rather than charity, and it excluded unwed or deserted mothers.[23] Family law at this time began to impose and enforce more private financial obligations, to ensure that male breadwinners

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[19] *Ibid.* at 28.

[20] See Jane Ursel, *Private Lives, Public Policy: 100 Years of State Intervention in the Family* (Toronto: Women's Press, 1992).

[21] *Ibid.* at 157.

[22] Snell, supra note 17 at 29.

[23] Ursel, supra note 20 at 158.

did not abandon their dependants. As Ursel observes, "[t]he introduction of each new welfare measure was invariably coupled with more detailed laws of familial obligation to ensure that state support would only be received when all available family resources had been exhausted. For example, we find a coincidence of the enactment of the Old Age Pension Act with the introduction of Parents Maintenance Acts and a tightening up of maintenance laws with the introduction of Mothers' Allowance."[24]

The regulation of marriage was very much about promoting and stabilizing a particular family form, based on a male breadwinner and a female dependant responsible for childcare and domestic labour. While debates around reform to the law of divorce often articulated the objectives of legal regulation in terms of promoting the stability of marriage, and the integrity of the marital relationship, the objective of supporting this particular family form as the basic social unit was never far from the surface. The emergence of the social wage, as well as a range of state welfare policies, were all informed by and served to reinforce this conjugal family and its sexual division of labour.

In the post-World War II period, the role of the state expanded, with the rise of the Keynesian welfare state, and the extension of a range of public benefits. The post-war period witnessed a rise in government expenditures on social services (education, health, social security) and income security programs (family allowances, old age security, and unemployment insurance). This period was also a time when the male breadwinner, nuclear family ideal appeared triumphant. Despite the founding principles of universality, many of the social programs of the era reflected this male breadwinner model. For example, in Canada, one of the earliest universal programs, the *Family Allowance Act*,[25] was designed as a wage subsidy program and recognized women as mothers and homemakers. However, the Keynesian welfare state only took root in Canada in the mid 1960s, with the passage of several major federal statutes, including the *Canada Pension Plan*,[26] the *Canada*

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[24] *Ibid.*, at 143.

[25] S.C.1944, c.40.

[26] S.C. 1964-65, c.51.

Assistance Plan,[27] and the guaranteed income supplement amendments to the *Old Age Security Act*.[28] Many of these programs were informed by assumptions about the male breadwinner model. For example, the *Canada Pension Plan* originally included a gender-specific widow's pension. It was based on the assumption that married women were financially dependent on their breadwinner husbands.[29] Further, if the widow remarried, she would lose her pension on the assumption that she would then be financially dependent on her new husband. Pension plans for federal public employees had similar survivor's benefits for widows, similarly premised on the male breadwinner model.[30]

In this male breadwinner model, marriage operated as a proxy for relationships of dependency. Marriage was assumed to involve a homemaker wife, who was financially dependent on her wage-earning husband. As such, marriage was assumed to be a highly economically integrated unit, in which wives provided unpaid domestic services and child care, and husbands provided financial support.

In current debates, particularly around same-sex marriage, much of this history disappears. The state interest in marriage is said to relate to reproduction, social stability, and social support.[31] Justice La Forest, in his dissenting opinion in *Egan* v. *Canada*, provided a classic statement of the "traditional" approach to marriage:

> Suffice it to say that marriage has from time immemorial been firmly grounded in our legal tradition, one that is itself a reflection of long standing philosophical and religious traditions. But its ultimate raison d'etre transcends all of these and is firmly anchored in the biological and social realities that heterosexual couples have the unique ability to procreate, that most children are the product of these relationships, and that they are generally cared for and nurtured by those who live in that relationship.[32]

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[27] S.C.1966, c.45.

[28] S.C. 1966-67, c.65.

[29] See discussion below.

[30] For example, the original versions of the *Public Service Superannuation Act 1953*, and the *Canadian Forces Superannuation Act*, discussed below at notes 192-3.

[31] See Martha Bailey, *Marriage and Marriage-Like Relationships* (Law Commission of Canada, 1999).

[32] *Egan* v. *Canada*, [1995] 2 S.C.R. 513 at para 21[hereinafter *Egan*]

But, the promotion of marriage has, since "time immemorial" served many state objectives. Citizenship, property, religion, and supporting a sexual division of labour have all been important objectives in the legal regulation of marriage. Through this century, the objective of state regulation of marriage has been to support a particular family form, based on the assumptions of a male breadwinner and female dependency. As a result of these assumptions, marriage has been used in state regulation as a proxy for relationships of dependency.

B. Critique of the Traditional Objectives: Demographic, Legal and Normative Changes

In this section, we trace the demographic, legal and normative shifts that have together undermined the 'traditional' state objectives of promoting marriage.

1. Demographic Shifts

The last 30 years have witnessed major demographic shifts in the ways in which Canadians live in families, emphasizing the increasing diversity of adult relationships. This shift, referred to as a second demographic transition, is part of a trend in many Western countries, characterized by a growth in non-marital cohabitation and single parent families, a decline in marriage, a rise in divorce, and an increase in non-marital child bearing. While the majority of Canadians still live in families (in 1996, 84% lived in families), the nature of those family settings has changed. In 1996, 45% of all families were married couples with children, 29% were married couples without children, 15% were lone-parent families, 6% were common law couples with children, and 6% were common law couples without children.[33]

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[33] Statistics Canada, *1996 Census: Marital Status, Common-law Unions and Families:* (Ottawa: Statistics Canada, 1997).

(a) Non-marital conjugal relationships

Amongst the most dramatic changes in the second demographic transition is the growth in non-marital cohabitation. There has been a dramatic increase in the number of persons living in non-marital conjugal relationships, or what are often called common law relationships. Since the early 1980s, the number of persons living common law has tripled. There were approximately 2,000,000 such persons in 1995, as compared to 700,000 in 1981. These couples living common law represented less than 1 in 16 couples in 1981, but had grown to nearly 1 in 6 by 1995. In 1995, 14% of all Canadian couples were living common law, more than twice the proportion they represented in 1981 (6.3%). The number is even higher in Quebec where 25% of all couples were living common law. The increase in common law couples with children is also striking, growing from 2.2% in 1981 to 5.5% in 1996.[34]

There has been a corresponding increase in the number of first unions that are common law unions. Between 1970 and 1974, 17% of all first unions were common law. Between 1980 and 1984, the percentage of first unions that were common law had grown to 41%, and between 1990 and 1995, that number had increased again to 57%. The number again is higher in Quebec where 80% of all first unions are common law.[35]

(b) Marriage

Over the past two decades, there has been a decrease in marriage rates. In 1991, there were 6.4 marriages per 1000 population, compared with 7.8 in 1981 and 8.9 in 1971. Marriage rates increased between 1986 and 1989, probably reflecting the changes to the *Divorce Act*,[36] and the ability of divorcing couples who were now able to remarry once their divorces were finalized. Since

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[34] See Anne-Marie Ambert, *Divorce: Facts, Figures and Consequences* (Ottawa: Vanier Institute of the Family) online: <http://www.vifamily.ca/cft/divorce.divorce.htm>; Pierre Turcotte and Alain Belanger, *The Dynamics of Formation of First Common Law Unions in Canada*, online: <http://www.statcan.ca/english/research/other9.htm>;Vanier Institute of the Family, *Profiling Canada's Families* (Ottawa: Vanier Institute of the Family, 1994).

[35] Anne-Marie Ambert, *ibid.*, citing Pierre Turcotte and Alain Belanger, "Moving in Together: Formation of First Common Law Unions," *Canadian Social Trends* at 7-10.

[36] R.S.C. 1985, c. 3 (2nd Supp.).

1990, marriage rates have again been decreasing. In 1995, the marriage rate was 5.4 per 1000 population.[37] Between 1995 and 1999, the total number of marriages in Canada has declined slightly, from 160,251 to 154,750.[38]

(c) Divorce

As Table One indicates, there was a dramatic increase in divorce following the enactment of the first federal *Divorce Act* in 1968,[39] liberalizing the grounds of divorce, and another increase following the enactment of the new Act in 1985. However, divorce rates appeared to have peaked by 1987, and there has been a slow but steady decrease in the total number of divorces since that time.

TABLE ONE

DIVORCE RATES IN CANADA[40]

Year	# of divorces	Rate per 100,000 pop.	Rate per 100,000 married couples
1961	6,563	36.0	N/A
1968	11,343	54.8	N/A
1981	67, 671	271.8	1,174.4
1985	61,980	253.6	1,103.3
1987	96,200	362.3	1,585.5
1993	78,226	N/A	N/A
1995	77,636	262.2	1,221.9
1997	67,408	N/A	N/A

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[37] Statistics Canada, *1996 Census*, *supra* note 33.

[38] Statistics Canada, *Canadian Statistics: Families, households and housing*, online: <http://www.statcan.ca/english/Pgdb/People/Families/famil04.htm>

[39] S.C. 1967-68, c.24.

[40] Source: Anne-Marie Ambert, *supra* note 34 based on Statistics Canada figures.

(d) Lone-Parent Families

In 1996, lone-parent families constituted 15% of all families, an increase from 11.3% in 1981. The vast majority of lone-parent families are headed by women (83% in 1996). The majority of lone parent families were divorced or separated.[41] Both women and men are less likely to be lone parents as a result of the death of a spouse (20.6% and 23.4% respectively in 1991) compared to the 1950s and 1960s, when almost two thirds of lone parents were widows or widowers. In 1991, 20% of female lone parents were never married, as compared to approximately 8% of male lone parents.[42]

(e) Non-Marital Childbearing

In 1981, common law couples with children represented only 1.9% of all Canadian families. In 1996, the percentage of common law couples with children had grown to 5.5.%.

(f) Women's Labour Force Participation

Since the mid-1960s, there was a been a dramatic increase in women's labour force participation. Table Two illustrates the increase in married women's labour force participation.

TABLE TWO

WOMEN'S LABOR FORCE PARTICIPATION

Year	% of married women in labour force
1941	5%
1961	22%
1985	55%
1991	61%

(source – Statistics Canada, Vanier Institute of the Family)

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[41] In 1991, 32.5% of female lone parents were divorced, and 24.6% were separated. Similarly, 33.6% of male lone parents were divorced, and 37.6% were separated.

[42] Colin Lindsay, *Lone-Parent Families in Canada* (Ottawa: Statistics Canada, 1992).

In 1967, 61% of Canadian families had a sole male breadwinner, and only 34% had a dual male/female income earners. By 1990, only 15% of Canadian families followed a sole breadwinner model, and 62% had dual male/female income earners.[43] Further, women's incomes now contribute to an increasingly significant proportion of families' incomes. In 1992, wives' earnings represented 31% of the income of dual income families, up from 29% in 1989, and 26% in 1967.[44] Women's participation in the labour market has become essential to the living standard of families.[45] The male breadwinner model of the so-called traditional family no longer characterizes the vast majority of Canadian families.

2. Legal Shifts

Prior to the passage of Bill C-23, the federal regulation of adult personal relationships in many statutory contexts has relied exclusively on marriage as the marker of the relationships relevant to the accomplishment of policy objectives. Change arrived first in the context of pension survivor's benefits. As early as 1919, and accelerat50ing in the 1950s, the marital model was expanded to include unmarried cohabiting couples in pension laws. In 1955 the *Defence Services Pension Continuation Act*[46] created the discretion to deem a cohabitant to be a surviving widow if she could establish that she had "been maintained" and "publicly represented by the contributor as the spouse of the contributor"[47] for seven years. The *Canadian Forces Superannuation Act*[48] of

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[43] Vanier Institute of the Family, *supra* note 34 at 74.

[44] Statistics Canada, 1995

[45] The relative importance of wives earnings to total family income is also reflected in the percentage of Canadian families whose income would fall below the low income cut-off points but for wives earnings. In 1992, 4% of Canadian families were below this line. If women's earnings were subtracted, 16% of these families were fall below the line. Statistics Canada, *Ibid.* at 88.

[46] S.C. 1955, c.28.

[47] For 7 years, if either the deceased or claimant were married to someone else, or for an unspecified 'number of years' if neither was married.

[48] S.C. 1959, c. 21, s.12(4).

1959 and the *Canada Pension Plan*[49] of 1966 contained similar provisions permitting common law spouses to apply for widows' pensions. The model for the recognition of common law relationships was highly restrictive. It was explicitly gender based, as a response to the assumed dependency of women within conjugal opposite-sex relationships. In contrast to the rights of a married spouse, it was up to the Minister's discretion whether or not a common law spouse had a claim. The onus was placed on the claimant to establish the facts supporting the existence of the common law relationship and a lengthy period of cohabitation was required.

Further expansion in the legal definitions of spouse did not occur until the mid-1970s, when the growth in non-marital cohabitation began to be accompanied by a gradual shift in the law's approach, with a growing recognition of marriage-like relationships. With the increase in cohabitation outside of marriage, the law began, in an ad hoc manner, to extend rights and responsibilities to couples who lived in marital-like relationships. Private family law was slowly expanded in the 1970s and early 1980s, through the extension of support obligations and provisions dealing with cohabitation agreements,[50] and the use of the principles of unjust enrichment to address the property rights of cohabiting couples.[51] In the context of provincial social assistance, the state has always taken an expansive approach to the recognition of spousal relationships in an attempt to reduce welfare costs by privatizing support obligations.[52] At the federal level, the rights of cohabiting couples were extended and strengthened in pension statutes. In 1975, for example, the spousal allowance was introduced in the *Old Age Security Act*, and the definition of spouse included "persons of the opposite sex who have lived together for at least one year and have publicly

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[49] *Canada Pension Plan*, S.C. 1964-65, c. 51, s. 56. Remarriage terminated a widow's right to a pension. Married spouses' claims were also terminated by seven years of cohabitation with a common law spouse.

[50] *Family Law Reform Act, 1978*, S.O. 1978, c.2.

[51] *Pettkus* v. *Becker*, [1980] 2 S.C.R. 834.

[52] See Shelley A.M. Gavigan, "Legal Forms, Family forms, Gendered Norms: What is a Spouse?", (1999) 14 Can. J.L. & Soc. 127, 143 (arguing that especially for sole support mothers on social assistance, "the definition of 'spouse' has always been broad in reach and mean in its application"); see also Shelley A.M. Gavigan, "Paradise Lost, Paradox Revisited: The Implications of Familial Ideology for Feminist, Lesbian and Gay Engagement to Law", (1993) 31 Osgoode Hall L.J. 589, 616.

represented themselves as man and wife".[53] In the 1970s Parliament made modest improvements to the limited recognition of common law spouses in the Canada Pension Plan and employment pension statutes.[54] However, apart from pension statutes, all federal laws explicitly addressing the legal status of spouses, including those enacted in the 1970s and 1980s, continued to be restricted to married spouses.[55]

In the 1990s, the definition of spouse again began to undergo further expansion, again in an *ad hoc* manner. In 1992, the *Pension Benefits Division Act*[56] was enacted, and included opposite-sex couples who cohabited in a conjugal relationship for not less than a year.[57] In 1993, the definition of spouse in the *Income Tax Act* was similarly expanded beyond husbands and wives to include opposite-sex conjugal cohabitants who have lived "with the taxpayer in a conjugal relationship" for at least a year.[58] Likewise, in 1995 the *Members of Parliament Retiring Allowances Act*[59] was amended to entitle opposite-sex conjugal cohabitants to survivor's benefits.[60]

These reforms eroded the law's role in privileging marital over non-marital relationships. At the same time, they continued and indeed consolidated the law's role in privileging marriage-like or conjugal relationships over non-conjugal relationships. The objectives underlying the extension of rights and responsibilities to unmarried cohabitants was to recognize that these relationships were, in some respects, functionally similar to marital relationships, particularly in relation to economic

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[53] R.S. 1970, c.O-6; as amended 1974-75-76, c. 58. This definition also applied for the Guaranteed Income Supplement under the Act.

[54] The *Canada Pension Plan* and a number of employment superannuation plans were amended to extend survivor's benefits to widowers, to eliminate the requirement that a common law spouse establish that she had been maintained by the deceased, and to reduce the required length of cohabitation before a common law spouse's application for survivor's benefits could be considered. The details can be found in Appendix A, "Origins and Evolution of Definitions of Common Law Spouses in Federal Legislation", *infra* p.xx.

[55] This was also true for some pension statutes. For example, the *Governor's General Act* R.S.C. 1985, c.G-9, and the *Judges Act*, R.S.C. 1985, c.J-1 only allowed survivor benefits to married spouses.

[56] S.C. 1992, c.46.

[57] *Pension Benefits Division Act*, S.C. 1992, c.46, s.2(1).

[58] *Income Tax Act*, S.C. 1994, c.7, Sch. VIII (1993, c.24), subsec. 140(3), applicable as of January 1, 1993.

[59] R.S.C. 1985, c.M-5.

[60] S.C. 1995, c.30, s.4 and s.13.

dependency. These laws were often based on a recognition and promotion of the same sexual division of labour, recognizing the economic dependency of women within opposite-sex relationships.

More recently, the expansion of spousal definitions has been propelled by the constitutional norms of equality, which require the removal of discrimination on the basis of marital status.[61] This process of expanding the legal recognition of spousal-like relationships also began to be applied to same-sex couples, as constitutional norms increasingly required the removal of discrimination on the basis of sexual orientation. In 1997, the British Columbia government introduced legislation extending legal rights and responsibilities to same-sex relationships. In 1999, the Ontario Government introduced Bill 5, which extended to same-sex couples the same legal rights and responsibilities as cohabiting opposite-sex couples.[62] In 1999, the federal *Public Sector Pension Investment Board Act*, amended the definition of survivor in a range of federal pension laws to remove the opposite-sex requirement.[63] And earlier this year, the federal government introduced Bill C-23, the *Modernization of Benefits and Obligations Act*, which will significantly extend the rights and responsibilities of both opposite and same-sex unmarried cohabitants.

3. Normative shifts

The demographic and legal shifts have been accompanied by a change in contemporary attitudes towards the regulation of adult relationships. There appears to be an emerging consensus in Canadian society that it is no longer legitimate to promote or discourage adult relationships solely on the basis of their status or formal attributes. Promoting relationships simply on the basis of status

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[61] In 1986, Ontario enacted the *Equality Rights Statute Law Amendment Act*, 1986, S.O. 1986, c.64, an omnibus bill that amended the definition of spouse in over 30 statutes to include unmarried couples, based on the government's assessment that marital status discrimination was covered under section 15 of the Charter.

[62] Bill 5, *An Act to amend certain statutes because of the Supreme Court of Canada Decision in M. v. H.*, 1st Session, 37th Parl., Ontario, 1999 (assented to 25 October 1999, S.O. 1999, c.6).

[63] S.C. 1999, c. 34. A 'survivor' is defined in s.29(1) as including a person 'cohabiting in a relationship of a conjugal nature with the contributor for at least one year immediately before the death of the contributor'.

(marital over non-marital, legitimate over illegitimate, biological over social, heterosexual over homosexual) is increasingly seen as violating the basic values of individual autonomy, privacy, equality and security.

(a) Public Opinion

There has been a significant shift in public attitudes towards non-marital unions over the last decade, particularly in attitudes towards same-sex couples. A brief review of public opinion polls over the last decade demonstrates this change.

In 1992, a Gallop poll found that 61% of Canadians opposed same-sex marriages.[64] In 1994, a Gallop poll found that more than 40% of Canadians under the age of 40 now support same-sex marriages compared with only 29% of the general population. [65] In 1996, an Angus Reid poll found that a slight majority of Canadians were in favour of same-sex marriage, with 49% of Canadians in favour of gay marriage and 47% opposed. [66] Fifty-five percent of respondents supported the granting of same-sex benefits.

In 1998, an Angus Reid poll conducted for the Department of Justice found that 74% of respondents supported the extension of federal social benefits to gay couples, 69% wanted them to receive income benefits and obligations, and 67% said same-sex couples should receive the same benefits and obligations as common law couples.[67] However, only 59% of respondents supported calling gay couples "spouses". The support for legally calling same-sex couples "spouses" is most likely to come from Canadians between the ages of 18 to 34 years. The lowest levels of support tended to be among those over 54 years. The poll also found that 71% of respondents believed that

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[64] *Toronto Star* (13 September 1992)

[65] *Maclean's* (16 May 1994).

[66] British Columbia Report July 22, 1996.

[67] Canadian Press, "Canadians ready to accept same-sex marriage – poll: Gays should get benefits but not be called 'spouse'" *Edmonton Journal* (10 February 2000).

benefits and obligations should not depend on spouse-like relationships but on any relationship of economic dependency.[68]

An Angus Reid survey carried out between May 25-30, 1999 found that 53% of Canadians believed that same-sex couples who wish to marry should be allowed to do so.[69] The survey further found that 63% of Canadians believed that gays and lesbians should be entitled to spousal benefits. Overall, the public opinion polls demonstrate shifting attitudes towards same-sex couples. Within less than a decade, a significant majority of Canadians now believe that same-sex couples should be entitled to the same spousal benefits as opposite-sex couples. And a slight majority of Canadians now support same-sex marriage. Moreover, the polls generally confirm that attitudes are generational, with younger Canadians increasingly supporting equal treatment and the right to marry for same-sex couples. While this issue does not appear to be have been tracked in the same way over time, the 1998 Angus Reid Poll reveals that Canadians are overwhelmingly in favour of extending benefits and obligations on the basis of economic dependency, rather than spousal status. Canadian attitudes towards the legal regulation of adult relationships seem to be moving away from exclusive support for the traditional family towards a broader approach that includes same-sex couples, as well as non-conjugal relationships. Canadians appear to be increasingly committed to freedom of intimate association, and to the equal treatment of and respect for the choices that individuals make in structuring their personal relationships.

(b) Constitutional Values

Canadian's commitment to freedom of intimate association and to the equal treatment and respect of the choices that adults make in structuring their personal lives now finds constitutional expression. The *Canadian Charter of Rights and Freedoms*[70] as well as federal and provincial human rights codes, prohibit discrimination on the basis of sex, marital status and sexual orientation.

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[68] *Ibid.*

[69] "Most in Poll want Gay marriages legalized", *Globe and Mail*, (10 June 1999).

We focus here briefly on two leading decisions of the Supreme Court of Canada that deal with marital status discrimination and sexual orientation discrimination, respectively.

In *Miron* v. *Trudel*,[71] the Supreme Court of Canada, by a 5-4 majority, held that a definition of spouse that excluded unmarried cohabiting couples for the purposes of recovering insurance benefits following a motor vehicle accident violated section 15 of the *Charter*. The majority opinions of McLachlin J. and L'Heureux-Dubé J. held that section 15 prohibited discrimination against unmarried couples. In McLachlin J.'s view,

> ...discrimination on the basis of marital status touches the essential dignity and worth of the individual in the same way as other recognized grounds of discrimination.... Specifically, it touches the individual's freedom to live life with the mate of one's choice in the fashion of one's choice. This is a matter of defining importance to individuals. It is not a matter which should be excluded from *Charter* consideration...[72]

Moreover, she said, the exclusion of unmarried cohabiting couples may perpetuate the historic disadvantage that they have suffered, ranging "from social ostracism through denial of status and benefits".[73]

Justice McLachlin further observed that "of late, legislators and jurists throughout our country have recognized that distinguishing between cohabiting couples on the basis of whether they are legally married or not fails to accord with current social values or realities."[74] She noted that many statutory provisions have extended rights and responsibilities to unmarried couples. Finally, the Court considered and rejected the argument that because marriage is "a good and honourable state", it cannot be a ground of discrimination. According to McLachlin J., the issue is "not whether marriage is good"; rather, the issue is whether "marriage can be used to deny equal treatment to people on grounds which have nothing to do with their true worth or entitlement." Quoting L'Heureux-Dubé J.'s comments in *Mossop* that "It is not anti-family to support protection for non-

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[70] Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* (U.K.), 1982, c. 11.

[71] [1995] 2 S.C.R. 418. [hereinafter *Miron*]

[72] *Ibid.*, para 151.

[73] *Ibid.*, at para 152.

[74] *Ibid.*, at para 155.

traditional families", she added that "One might equally say it is not anti-marriage to accord equal benefit of the law to non-traditional couples".[75]

In the section 1 analysis, the Court concluded that the exclusion of cohabiting couples was not rationally connected to the objectives of the legislation of sustaining families when one of their members is injured in an automobile accident. According to the Court, marital status was not a reasonably relevant marker of individuals who should receive benefits in the event of any injury to a family member in such an accident. The majority concluded that this was one of those "exceptional cases" in which the appropriate remedy was "reading in". It incorporated the subsequent amendments to the definition of spouse made to the *Insurance Act*[76] into the standard automobile insurance policy.

The Court's ruling in *Miron* suggests that laws dealing with spousal relationships that exclude unmarried couples are likely to violate section 15 of the *Charter*. They will be unconstitutional unless the government can demonstrate that the limitation of these laws to married spouses is necessary to accomplish pressing and substantial objectives. Court rulings since *Miron* have declared unconstitutional laws that exclude common law couples from the right to seek spousal support and a division of family property pursuant to provincial family laws.[77] Throughout the 1990s, a number of law reform commission reports across the country have similarly concluded that the continuing exclusion of common law couples' right to seek a division of property from provincial family laws is not justifiable.[78] While restricting rights and responsibilities to married couples was at one time the unquestioned norm of legal regulation, such restrictions have now come to be viewed as

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[75] Ibid, at para 158. See also *Canada (Attorney General)* v. *Mossop* [1993] 1 S.C.R. 554.

[76] R.S.O. 1980, c. 218.

[77] *Walsh* v. *Bona*, [2000] N.S.J. No. 117 (N.S.C.A.), online: QL; *Watch* v. *Watch*, [1999] S.J. No. 490 (Q.B.), online: QL; *Rossu* v. *Taylor*, [1998] A.J. No. 648 (Alta. C.A.), online: QL.

[78] See the Ontario Law Reform Commission, *Report on the Rights and Responsibilities of Cohabitants under the Family Law Act* (Toronto, The Law Reform Commission, 1993); the Law Reform Commission of Nova Scotia, *Final Report on the Reform of the Law Dealing with Matrimonial Property in Nova Scotia* (Halifax: The Commission, 1997); and the British Columbia Law Institute, *Report on the Recognition of Spousal and Family Status* (Vancouver: British Columbia Law Institute, 1999).

discrimination on the basis of marital status, and a violation of the basic value of the equality of intimate relationships.

In *M.* v. *H.*,[79] the Supreme Court of Canada, in an 8-1 majority, held that section 29 of the Ontario *Family Law Act*[80] discriminated on the basis of sexual orientation by excluding lesbians and gay men from the right to seek spousal support from a same-sex partner with whom they have cohabited. Applying the framework for equality analysis that a unanimous Court had elaborated in *Law* v. *Canada*,[81] the principal majority judgement of Cory and Iacobucci JJ.[82] found that section 29 of the Act violates the human dignity of lesbian and gay couples. According to the Court, the exclusion of these couples promotes the view that these couples are "less worthy of recognition and protection. It implies that they are judged to be incapable of forming intimate relationships of economic interdependence as compared to opposite-sex couples." Moreover, "it perpetuates the disadvantages suffered by individuals in same-sex relationships and contributes to the erasure of their existence."[83]

In the section 1 analysis, the majority held that the exclusion was not rationally related to the objectives underlying the spousal support provisions in Part III of the *Family Law Act*, which they characterized as dealing equitably with the economic needs of persons in interdependent relationships and the alleviation of claims on the public purse by privatizing the costs of family break down.[84] The majority concluded that the appropriate remedy was to declare section 29 of the Act to be of no force and effect. The declaration was suspended for six months to enable the Ontario legislature to consider ways of bringing this provision, and other laws, into conformity with the equality rights in the *Charter*.[85]

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[79] *M. v. H.*, [1999] 2 S.C.R. 3.

[80] R.S.O. 1990, c. F.3.

[81] [1999] 1 S.C.R. 497.

[82] Cory J. wrote the s.15 portion of the analysis, and Iacobucci J. dealt with the s.1 and remedial issues. Lamer C.J. and L'Heureux-Dubé, McLachlin and Binnie JJ. concurred with their joint judgment. Major J. and Bastarache J. wrote separate concurring judgments. Gonthier J. dissented.

[83] *M* v. *H, supra* note 79 at para. 73.

[84] *Ibid.* at para. 93.

In *M. v. H.*, the Supreme Court recognized the "conjugal nature" of same-sex relationships. For the first time, the Court recognized that same-sex relationships are entitled to the same rights and responsibilities as other unmarried conjugal relationships. While the Court was careful to restrict its conclusions to the legal provision at issue, its analysis had far-reaching implications. The Court noted that the legislatures may now wish to turn their attention to the numerous other statutes that rely on similar definitions of spouse.[86] The immediate implication of the decision was clear – the time had come for governments to recognize same-sex couples on the same basis as other unmarried conjugal couples.

Together, *Miron* and *M.* v. *H.* are powerful statements of the normative commitment to freedom of intimate association and to the equal treatment and respect of the choices that adults make in structuring their personal lives. The once legitimate government objective of privileging the marital relationship over all other relationships in the allocation of rights and responsibilities has given way to a recognition of the different ways in which individuals enter into adult personal relationships. The constitutional decisions are both limited, however, to individuals living in "conjugal" or "marriage-like" relationships. These decisions do not speak to the question of extending recognition, rights and responsibilities to non-conjugal couples. While Canadian attitudes towards non-conjugal couples appear to also be changing, this normative shift has not yet witnessed a similar judicial or constitutional affirmation.

The House of Commons has recently expressed its normative commitment to equality and freedom of intimate association in conjugal relationships by passing Bill C-23. In her comments on second reading of the Bill, Minister of Justice Anne McLellan stated that Bill C-23 is intended to bring federal statutes into line with the core Canadian values of "fairness, tolerance, respect and equality".

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[85] *Ibid.* at paras. 145-7.

[86] *Ibid.*

She added that the Bill is designed to respect the principle of equal treatment of persons living in "recognized stable relationships",[87] that is, "committed common law relationships".[88]

4. Conclusion

The demographic shifts in Canadian family structures are increasingly reflected in legal and normative shifts about the legal regulation of adult relationships. The second demographic transition, with its significant increase in unmarried cohabitation, has brought with it changed attitudes towards the once privileged marital relationship. While marriage remains an important social and normative institution for many Canadians, increasingly its status as the exclusive legal model for adult personal relationships is being abandoned. Other conjugal relationships– unmarried opposite-sex relationships and same-sex relationships - are increasingly seen as deserving of equal respect and recognition. There appears to be an emerging consensus that the values of equality and autonomy, which we explore in greater detail in the section that follows, require that the legal regulation of adult relationships reflect the changes in how individuals enter into their intimate personal relationships.

The legal regulation of non-conjugal relationships, however, is still relatively uncharted territory. On the one hand, as we will discuss in greater detail below, a broad range of non-conjugal relationships are already recognized in law. There appears to be considerable public support for the idea that benefits and obligations should depend on the existence of relationships of economic dependency, whether or not the relationships are conjugal or marriage-like.[89] The recent debates around Bill C-23 seem to have brought this issue squarely onto the public agenda. The Minister of Justice, in introducing the Bill for first reading, acknowledged that "there is some interest in extending benefits and obligations to individuals in other relationships of economic and emotional

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[87] *House of Commons Debates (Hansard 049)*, 15 February 2000, at 1100.

[88] *Ibid.*

[89] *Ibid.*

interdependence". On the other hand, appropriate state approaches to the regulation of non-conjugal relationships remain a relatively unexplored issue, and there is less evidence available that traces the demographic, legal and normative changes relevant to their situation.

In the section that follows, we explore the values and objectives that ought to animate state regulation of adult personal relationships. We believe that many of these values and objectives have resonance for both conjugal and non-conjugal relationships alike. Just as marital status is no longer considered an appropriate marker for the distribution of benefits and obligations, we believe that there is reason to seriously interrogate the extent to which conjugality remains the appropriate marker.

C. Identifying Legitimate Values and Policy Objectives

1. Values

We have identified five norms or values that ought to guide state regulation of adult personal relationships. The first is that relationships characterized by caring and commitment ought to be recognized and supported by the state because of their fundamental importance to the well-being of individuals and communities. The value of supporting and recognizing relationships of caring and commitment provides the underpinning of all legitimate state policies regarding adult personal relationships. It is, in that sense, the primary value at play in this context. The other four values come into play once it is accepted that the state ought to support and recognize relationships of caring and commitment. Those four values are autonomy, privacy, equality and security. The state ought to respect individuals' ability to choose whether or not to form personal relationships. Likewise, absent violence or exploitation, choices of intimate companions and decisions regarding the termination of personal relationships ought not to be interfered with by state policy. The state ought to avoid examinations into the details of people's intimate lives. Protecting a zone of personal privacy free from state intrusion is essential to creating a sense of security and trust in which

relationships of caring and commitment can flourish. In regulating adult personal relationships, the state must respect legal prohibitions on discrimination on the basis of sex, marital status and sexual orientation. And, finally, the state should seek to advance the security of persons in adult personal relationships by protecting their reasonable expectations.

We believe there is little controversy about the relevance of these values. Indeed, the value of supporting relationships of caring and commitment is so self-evident that it is frequently taken for granted in the literature. It is a value that unites commentators across disciplinary and political divides. Much of the contemporary debate about family policy in liberal democratic societies is concerned with how best to accomplish the support of relationships of caring and commitment while at the same time respecting basic individual rights to autonomy, privacy, equality and security. While debates about appropriate family policies frequently generate passionate disagreements, the disputes are not about the relevance of the five values we have identified. They are, rather, about the implications of these values for the design of particular state policies in the face of dramatic social and economic changes. Before turning to that topic, we will outline the dimensions of each of the five values.

(a) Caring and Commitment

There is a growing consensus that the value of adult personal relationships should be measured by their qualitative attributes, that is, by the roles they perform, the needs they meet, and the satisfactions they provide. Giddens has observed that intimacy has been restructured in contemporary liberal democracies, such that adults now form and maintain personal relationships "for what can be derived by each person from a sustained association with another".[90] In a context of diverse and fluid domestic arrangements, the value of personal relationships must be located in

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[90] A. Giddens, *The Transformation of Intimacy: Sexuality, Love and Eroticism in Modern Societies* (Stanford, CA: Stanford University Press, 1992) at 58. See also L. Jamieson, *Intimacy: Personal Relationships in Modern Societies* (Cambridge: Polity Press, 1998); U. Beck and E. Beck-Gernsheim, *The Normal Chaos of Love* (Cambridge: Polity Press, 1995).

actual practices and functions rather than formal legal attributes. As Silva and Smart have stated, "what a family is appears intrinsically related to what it does".[91]

What do adult personal relationships do that makes them worthy of state support and recognition? The answer lies in the provision of care in committed relationships. We all have needs to be known and to know another, to be loved and to love another, to be cared for and to care for another. Caring for another entails a bundle of roles, such as attending to emotional and sexual needs, sharing resources to provide food, shelter and clothing, and providing personal services and guidance to dependants such as children or disabled, elderly or infirm adults. For these needs to be met, patience and devotion over an extended period of time is required. As Nussbaum has argued, people "have interpersonal needs that are a deep part of who they are, and these needs are frequently best satisfied in relationships involving commitments that bind the parties over time".[92]

Relationships of caring and commitment are a public as well as a private good. Living together in economically and emotionally supportive relationships "enhances people's mental health, makes them more resilient in times of crises, allows them to pool their resources and thus makes them more productive".[93] If the state is attendant to the value and consequences of interdependent relationships, people will be more willing to make enduring commitments that promote the public good.[94]

(b) Autonomy

The freedom to choose whether and with whom to form intimate relationships is a fundamental interest in free and democratic societies. Karst has persuasively argued that "it is the

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[91] E.B. Silva and C. Smart, "The 'New' Practices and Politics of Family Life", in E.B. Silva and C. Smart eds., *The New Family?* (London: Sage, 1999) at 7 (emphasis added).

[92] Martha Nussbaum, "Preference and Family" in D.M. Estlund and M.C. Nussbaum eds., *Sex, Preference and Family: Essays on Law and Nature* 319 (New York: Oxford University Press, 1997) at 332.

[93] M. Eichler, *Family Shifts: Families, Policies,and Gender Equality* (Toronto: Oxford University Press, 1997) at 160.

[94] M. Minow, "All in the Family and In All Families", in Estlund and Nussbaum eds., *supra* note 92, 249 at 271 ("...predicating family duties on feelings may be hazardous, but so is disregarding the possibility that well-articulated family duties could influence positively the feelings people develop. This notion includes attending to the value of enduring commitments. Commitments can last beyond the feelings, especially if we encourage them to last.").

choice to form and maintain an intimate association that permits full realization of the associational values we cherish most", namely companionship, caring, commitment, intimacy and self-realization.[95] American constitutional doctrine has long recognized that "freedom of personal choice in matters of family life" is a fundamental liberty interest.[96] Choice and personal autonomy are fundamental values in Canadian constitutional doctrine as well. As Iacobucci J. stated in *R.* v. *Salituro*,

> The idea of human dignity finds expression in almost every right and freedom guaranteed in the *Charter*. Individuals are afforded the right to choose their own religion and their own philosophy of life, the right to choose with whom they will associate and how they will express themselves, the right to choose where they will live and what occupation they will pursue. These are all examples of the basic theory underlying the *Charter*, namely that the state will respect choices made by individuals and, to the greatest extent possible, will avoid subordinating these choices to any one conception of the good life.[97]

The value of associational autonomy requires that the state not directly interfere with adults' freedom to choose their intimate relationships. The state should also refrain from indirect interference with associational autonomy by, for example, creating financial pressure to abandon personal relationships of caring and commitment, or by according privileged status to certain kinds of relationships defined without reference to their qualitative attributes. The value of autonomy does not mean that the state should never intervene in personal relationships. Rather, the state has an obligation to ensure that autonomy is exercised in a manner that does not compromise the equal right to autonomy of others. For example, the state must take steps to protect adults who are vulnerable to economic exploitation or physical/emotional abuse in personal relationships.

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[95] K. Karst, "The Freedom of Intimate Association", (1980) 89 Yale L.J. 624 at 637.

[96] *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Santosky v. Kramer*, 455 U.S 745, 753 (1982). See also *Loving v. Virginia*, 381 U.S. 1, 12 (1967) (freedom to marry is "one of the vital personal rights essential to the orderly pursuit of happiness"); L. Tribe, *American Constitutional Law* (Mineola, NY: Foundation Press, 1978) at 989 ("the embedding of a choice within a close human relationship or network of relationships should always be regarded as significantly increasing the burden of justification for those who would make the choice illegal or visit it with some deprivation.").

[97] [1991] 3 S.C.R. 654 at 674.

(c) Privacy

Privacy is also recognized as a fundamental value in Canadian constitutional jurisprudence. It is, in the words of the Supreme Court, "at the heart of liberty in a modern state."[98] Privacy includes the right to be free from unwarranted state intrusion or interference in intimate spaces,[99] and the right to control the dissemination of confidential information.[100]

Relationships of caring and commitment are built on intimacy, candour and trust.[101] In our intimate relationships we reveal thoughts and actions that we are not willing to reveal to others. Without the confidence that our intimate thoughts and acts will not be discovered by others, personal relationships cannot flourish. In Charles Fried's words,

> To respect, love, trust, feel affection for others and to regard ourselves as the objects of love, trust, and affection is at the heart of our notion of ourselves as persons among persons, and privacy is the necessary atmosphere for these attitudes and actions, as oxygen is for combustion.[102]

At its most basic level, privacy requires that the state avoid physical intrusions into the "bedrooms of the nation". It also requires that the state avoid, wherever possible, the establishment of legal rules that cannot be administered effectively without intrusive examinations into, or disclosure of, the intimate details of adult personal relationships. Sexual behaviour, in particular, should not be subject to state investigations in the absence of a compelling objective. Sexuality is an especially intimate and sensitive aspect of many personal relationships. Moreover, absent violence or exploitation, the presence or absence of a sexual relationship, or the nature of adults' sexual acts, are matters that normally bear no relationship to legitimate state objectives. At the same time, privacy rights are not absolute, and must give way, with appropriate safeguards, to compelling

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[98] *R. v. Dyment*, [1988] 2 S.C.R. 417 at 427, per La Forest J.

[99] *R. v. Edwards*, [1996] 1 S.C.R. 128, at para. 50, per Cory J.

[100] *R. v. Mills*, [1999] 3 S.C.R. 668 at para. 80, per McLachlin and Iacobucci JJ.

[101] *Ibid.* at para 82 (Aprivacy is essential to maintaining relationships of trust").

[102] C. Fried, "Privacy" (1967-68), 77 Yale L.J. 475 at 477-8. See also D.J. Feldman, "Privacy-Related Rights: Their Social Value", in P. Birks ed., *Privacy and Loyalty* 15 (Oxford: Clarendon Press, 1997); J. Rachels, "Why Privacy is Important" (1975), 4 Philosophy and Public Affairs 323.

objectives such as the state interest in prosecuting and preventing crime, including the commission of crimes involving domestic violence and abuse.

(d) Equality

The guarantee of equality in the *Charter of Rights and Freedoms* requires that the state accord equal concern and respect to adult personal relationships regardless of personal characteristics such as the sexual orientation or marital status of the participants. Relationships can be treated differently according to their actual qualitative characteristics. However, the Supreme Court has held that neither marital status nor sexual orientation can be used as a proxy for identifying relationships characterized by emotional and economic interdependence.[103] Thus, state laws and policies cannot in their purposes or effects impose disadvantages on persons living in relationships of caring and commitment outside of marriage. Bill C-23, the *Modernization of Benefits and Obligations Act*, will implement the principle of relational equality in most federal statutes by eliminating the differences in the legal status of married spouses and persons living in conjugal relationships outside of marriage. However, Bill C-23 does not seek to achieve an equitable distribution of burdens and benefits between conjugal and non-conjugal relationships. Rather, conjugality will replace marriage as the proxy employed in federal statutes to identify relationships characterized by caring and commitment. This approach is inconsistent with the value of equality if conjugality does not in fact accurately identify the qualitative attributes of adult personal relationships that are relevant to particular state policies.

The value of equality also requires the state to be attentive to the potential for exploitation within personal relationships. This value is reflected in the profound changes that have occurred in the law of family property in recent decades, and in the increasing attention legislators have paid to the prevention of domestic violence. Finally, the value of equality requires an equitable distribution of

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[103] See *Miron v. Trudel*, [1995] 2 S.C.R. 418 (marital status); *M. v. H.*, *supra* note 79 (sexual orientation).

burdens and benefits within particular categories of relationships. This means that laws must employ definitions that are capable of consistent interpretation and enforcement.

(e) Security

Relationships of caring and commitment meet important human needs. They can create a sense of ordered, stable well-being in people's lives. At the same time, the combination of emotional and economic interdependence in personal relationships can give rise to distinct forms of vulnerability. Intimacy, privacy and interdependence are features that in combination afford unique opportunities for violence and exploitation to which the state must respond. Moreover, the state ought to recognize and respond to the fact that people structure their lives around a set of reasonable expectations formed in adult personal relationships. It is common for people to rely on an expectation that they will continue to benefit in the future from the economic and emotional support provided by their personal relationships. Persons in committed relationships reasonably expect the state to provide them with some protection in meeting their needs if they suffer a sudden deprivation of emotional and economic support. The state should promote the security of persons in intimate relationships by providing them with an identifiable and accessible set of legal protections to respond to these reasonable expectations.

The value of security does not mean that the state should respond to all expectations formed in personal relationships. It should, however, respond to 'reasonable' expectations determined by an objective standard: what would a reasonable person have expected in all of the circumstances? Such mixed objective/subjective evaluations are common in Canadian law. For example, in *Pettkus* v. *Becker*, Dickson J. (as he then was) held that a common law partner's reasonable expectations entitled her to a share of family property:

> ....where one person in a relationship tantamount to spousal prejudices herself in the reasonable expectation of receiving an interest in property and the other person in the relationship freely accepts benefits conferred by the first person in circumstances where he

> knows or ought to have known of that reasonable expectation, it would be unjust to allow the recipient of the benefit to retain it.[104]

The reasonableness of individual expectations is a factor of shifting social norms: individual expectations are normally considered reasonable when they converge with social norms, and not reasonable when they diverge. If societal expectations have not crystallized, or cannot be ascertained, an objective/subjective inquiry can still be useful in identifying reasonable expectations that ought to be protected by the state.

II. Mapping Existing Federal Legislation

In this section, we categorize and map on to a list of legitimate policy objectives existing federal legislation that employs spousal and relational criteria. In this mapping, we will also provide examples of the variety of spousal and relational definitions. This section will not consist of a detailed examination of all federal legislation. We will attempt to at least identify all relevant federal statutory provisions and allocate them to the appropriate objective. From the group of statutory provisions allocated to each objective, we will choose at least one for a detailed examination that will explore its origins and rationale.

The employment of relational criteria in federal legislation is ubiquitous. There are literally hundreds of statutory provisions that regulate adult personal relationships by employing terms such as spouse, family, dependant, cohabitant and, if Bill C-23 is enacted, common law partner. At first glance, this vast array of legislative activity does not appear to adhere to any organizing principles. On closer examination, however, it becomes apparent that the state is seeking to accomplish two basic objectives in regulating adult personal relationships. The first is to enable people to form and

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[104] [1980] 2 S.C.R. 834. See also *Arndt v. Smith*, [1997] 2 S.C.R. 539 (mixed objective/subjective test for determining whether plaintiff would have undergone medical procedure if fully informed); *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 (mixed objective/subjective test for determining whether differential treatment violates the human dignity of the claimant and thus constitutes discrimination).

to dissolve a legally recognized relationship. Currently this is accomplished primarily through the law of marriage and divorce. The second and very broad objective is to take into account the multitude of consequences that accompany relationships characterized by emotional and economic interdependence. This general objective manifests itself in a number of particular ways at every stage of the evolution of adult personal relationships. Each of these objectives, illustrated in Table Three, will be described below.

TABLE THREE

STATE OBJECTIVES BY STATUTE

Objectives	**Examples of Federal Statutory Provisions**
1. Regulating the formation and dissolution of adult, personal relationships	*Marriage (Prohibited Degrees)Act* *Divorce Act, s.8* (grounds for divorce) *Criminal Code*, ss.290, 293 (bigamy & polygamy)
2. Responding to the Consequences of Emotional and Economic Interdependence in Adult Personal Relationships	
2(a) Supporting the Integrity and Security of interdependent relationships	*Immigration Act, Employment Insurance Act* s.29, *Evidence Act.* s.4(3), *Criminal Code*, s.23(2)
2(b) Recognizing the potential existence of shared economic interests in family relationships (conflict of interest)	*Bank Act, Business Development Bank of Canada Act, Canada Cooperatives Act, Cooperative Credit Associations Act, Canada Corporations Act, Insurance Companies Act, Unemployment Insurance Act*
2(c) Tailoring financial benefits or penalties to recognize the consequences of economic dependence or interdependence	*Canada Pension Plan , Old Age Security Act, Pension Benefits Standards Act, Public Service Superannuation Act* (and other superannuation Acts)
2(d) Recognizing the Economic Costs and Value of Caregiving Relationships	*Income Tax Act*
2(e) Compensation for the loss of, or harm to, emotional and economically interdependent relationships	*Canada Shipping Act*, s.645 , *Carriage by Air Act, Canada Labour Code*, s.210(1), *Judges' Act.* s.40(1)
2(f) Preventing violence or abuse during and upon the break down of personal relationships	*Criminal Code*
2(g) Restructuring financial relationships on the break down of adult personal Relationships	*Divorce Act*, s.15.1, 15.2, s.16 *Canada Pension Plan* *Family Orders and Agreements Enforcement Assistance Act, Garnishment Attachment and Pension Diversion Act*, several superannuation Acts

Since at the time of writing (May 2000) there are no apparent obstacles to the imminent enactment of Bill C-23, we will describe federal statutory provisions in this section as if they have already been amended by the Bill.

A. Regulating the formation and dissolution of adult, personal relationships

An important objective of federal legislation has been the regulation of the formation and dissolution of adult personal relationships. To be more specific, federal legislation has regulated to a limited extent the entry into and, to a much greater extent, exit from marriage. As long as the institution of marriage itself is an important legal category, it is important that there be clear rules about the formation and dissolution of this institution.

1. Entry into Marriage

The *Constitution Act, 1867*, s.91(26) gives the federal government power to make laws in relation to "marriage and divorce".[105] Section 92(12) gives provincial legislatures the power to make laws in relation to "the solemnization of marriage in the province". As a result of this division of power, the federal Parliament has exclusive jurisdiction over the essential validity of marriage and the recognition of foreign marriages, while the provinces have jurisdiction over the formal validity of marriage.[106] The essential validity of marriage deals with the capacity of individuals to enter into a marriage. At common law, the parties must be of the opposite sex, have the ability to consummate the marriage, have reached a minimum age, not be related too closely by consanguinity or affinity, not be parties to a prior existing marriage, and have the capacity to consent. Until this year, Parliament did not see any need to enact legislation incorporating these common law rules. Section

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[105] *Constitution Act, 1867*, UK, 30 & 31 Victoria, c. 3.

[106] See Bushnell, "Family Law and the Constitution", (1978) 1 Can. J. Fam. L. 202; Katz, "The Scope of the Federal Legislative Authority in Relation to Marriage", (1975) 7 Ott. L. Rev. 384.

1.1 of Bill C-23 will become the first definition of marriage to appear in a federal statute. It will define marriage "as the lawful union of one man and one woman to the exclusion of all others".

The federal government has rarely exercised its jurisdictional authority over marriage. There is no comprehensive federal legislation governing the essential validity of marriage, nor the foreign recognition of marriage. In 1990, the federal government enacted the *Marriage (Prohibited Degrees) Act*[107] that reformed the rules of consanguinity and affinity. This law replaced the *Marriage Act*[108] which had included a more extensive list of prohibited degrees of consanguinity and affinity. All other aspects of the essential validity of marriage continue to be governed by common law, and in Quebec, by the Civil Code.[109]

The bigamy and polygamy prohibitions in the *Criminal Code*[110] are also part of the legal regulation of marriage, and can be seen to form part of the set of rules governing the formation of marriage. While the common law rules of marriage provide that a marriage is void if there is a prior existing marriage, the *Criminal Code* makes entrance into a bigamous or polygamous marriage a criminal offence. Section 290 provides that any one who commits bigamy – defined as going through a form of marriage while married to another person – commits an offence. Section 293 provides that every one who practices or enters into any form of polygamy, or any kind of conjugal union with more than one person at the same time, commits an offence and is liable to imprisonment for a term not exceeding five years.

2. Exit from Marriage

In striking contrast, the federal government has fully exercised its constitutional jurisdiction over divorce. The *Divorce Act, 1968* was the first nation-wide, uniform law of divorce. The Act

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[107] S.C. 1990, c.46.

[108] R.S.C. 1970, c.A-14.

[109] *Civil Code of Quebec* Art. 1260 C.C.Q.

[110] R.S.C. 1985, c. C-46.

recognized marital offence grounds[111] and non-marital offence grounds for divorce.[112] The 1968 Act was replaced by the *Divorce Act 1985,* which now provides for divorce on the basis of permanent marital break down. The *Divorce Act 1985* sets out the jurisdiction over divorce[113], the grounds and bars to divorce[114], as well as the procedural requirements and legal effects of divorce (effective dates, appeals, filing of affidavits). It also includes provisions for spousal and child support, which are discussed in further detail in the next section on restructuring financial relationships, as well as provisions for the resolution of child custody and access.[115] The regulations issued pursuant to the *Divorce Act 1985* provide the establishment and operation of the Central Registry of Divorce Proceedings in Canada. [116]

As long as the institution of marriage itself is a relevant legal category, it is a legitimate government objective to establish clear rules about the formation and dissolution of this institution. To the extent that legal rights and responsibilities are created on formation and/or dissolution of marriage, there needs to be rules regulating the status of marriage and divorce. These rules protect the interests and choices of the parties themselves, by providing a clear demarcation of the termination of the status of the relationship. It also protects the interests of third parties, whose economic interests might be affected by the existence or non-existence of a marital relationship.

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[111] Section 3 set out the matrimonial offence grounds for divorce, including adultery, sexual offences, bigamy, and cruelty.

[112] Section 4 introduced the idea of permanent marriage break down as the basis for divorce, including imprisonment, living separate and apart for 3 years, desertion for 5 years, and addiction to alcohol.

[113] Section 3 sets out the jurisdiction of courts, and the rules for resolving potential jurisdictional conflicts in divorce proceedings.

[114] According to section 8, there are three grounds for establishing this permanent marital break down – living separate and apart for one year, adultery and cruelty.

[115] The provisions dealing with child custody and access, which regulate parent-child relationships, are beyond the scope of this paper, which is focusing on the regulation of adult relationships.

[116] *Divorce Act, 1985, Regulations*, SOR/86-600.

B. Responding to the Consequences of Emotional and Economic Interdependence in Adult Personal Relationships

The second general objective of state regulation is to take into account the consequences that accompany relationships characterized by emotional and economic interdependence. This objective manifests itself in a number of particular ways at every stage of the evolution of adult personal relationships. The state has an interest in supporting the integrity and security of ongoing relationships of caring and commitment, and recognizing the value of care-giving provided in those relationships. The state has an interest in protecting people from violence and exploitation to which they may be particularly vulnerable in personal relationships. The possible existence of shared economic interests arising in relationships of caring and commitment is relevant to many state objectives in the context of the regulation of economic transactions. The economic and emotional interdependence that characterizes adult personal relationships can be disrupted by a number of events such as injury, illness, retirement or death. The state has an interest in cushioning the impact that the sudden loss of emotional and economic support can have on persons in relationships of caring and commitment. In the discussion that follows, we will canvass the range of federal statutes that seek to accomplish each of these objectives.

1. Supporting the Integrity and Security of Interdependent Relationships

An important objective of federal legislation is the preservation of the stability and integrity of on-going interdependent relationships. Federal legislation includes a broad range of provisions that attempt to remove obstacles to the continuation of adult personal relationships.[117] For example, the *Employment Insurance Act*[118] includes a statutory provision that is designed to protect and

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[117] E.g. s.5(1.1) of the *Citizenship Act*, R.S.C. 1985, c. C-29 (providing that a non-citizen who resides abroad with a Canadian spouse or common law partner who is working for the government abroad will have that time abroad counted as a day of residence in Canada for the purposes of the Act); s.16.20(2), s.24.10(4), s.26.20 and s.35(1) of the *Young Offenders Act* R.S.C. 1985, c. Y-1 (taking into account an offender's proximity to family in making orders in relation to imprisonment, secure custody, conditional supervision or temporary release); s.264(2) of the *Criminal Code* (criminal harassment includes threatening behaviour to any member of a person's family); s.423(1) of the

promote the integrity of ongoing interdependent relationships. Section 29 sets out the kinds of factors to be taken into account in determining whether there was "just cause" for voluntarily leaving or taking leave from employment, for the purposes of eligibility for unemployment insurance benefits. The factors in section 29(c) include an "obligation to accompany a spouse, common law partner or dependent child to another residence" and an "obligation to care for a child or a member of the immediate family."[119] As a result of section 29(c), an individual will not be deprived of the benefits to which they would otherwise be entitled by virtue of leaving a job in order to accompany their spouse or dependent child, or to care for a child or immediate family member. The provision removes a significant financial disincentive to the maintenance of ongoing relationships of interdependency or dependency.

We have chosen to examine in greater detail two examples of laws with the objective of preserving and promoting the integrity of ongoing relationships: immigration law that allows for family reunification, and evidence laws that place restrictions on spousal testimony in criminal trials.

(a) Immigration

The *Immigration Act, 1976*[120] has a number of provisions that recognize and promote the integrity of ongoing interdependent relationships. The Act states that a foremost objective of the Act is to "facilitate the reunion in Canada of Canadian citizens and permanent residents with their close

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Criminal Code (criminal intimidation includes violence or threats of violence to one's spouse, common law partner or children, or intimidation of a relative); s.810 of the *Criminal Code* (information can be sworn if a person fears for the safety of his or her spouse, common law partner or child); s.210(1) of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (entitles employees to bereavement leave upon the death of immediate family members); s.2 of the *Witness Protection Program Act*, S.C. 1996, c. 15 (entitles persons to protection if they are vulnerable to threats because of their relationship with a witness); s.28 *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (criteria for selecting penitentiary include accessibility to an inmate's home community and family); s.71(1) of the *Corrections and Conditional Release Act* (inmates entitled to have reasonable contact, including visits and correspondence, with family and friends); s.17(1) and s.116(1) of the *Correctional and Conditional Release Act* (family leave entitlements).

[118] S.C. 1996, c. 23.

[119] *Ibid.*, s.29 as amended by Bill C-23, s.108.

[120] S.C. 1976-77, c. 52.

relatives abroad".[121] The *Act* allows for the immigration of "accompanying dependants".[122] An individual who is granted an immigration visa may bring to Canada their "accompanying dependants", defined as a spouse, and any unmarried son or daughter under 19 years of age. Any individual granted admission as a refugee may similarly bring their dependants. The objective of these provisions is to protect the integrity of close family relationships, by allowing an individual who is eligible to immigrate to Canada to bring his or her spouse and/or children.

Bill C-23 does not contain any amendments to the *Immigration Act*. The definition of spouse within the categories of accompanying dependants and family class therefore remains unchanged to date. Spouse is currently defined in the *Immigration Regulations, 1978* as "the party of the opposite sex to whom that person is joined in marriage"[123] The family class also allows a person to sponsor their fiancé.[124] Unmarried couples do not qualify as accompanying dependants, nor do they qualify as members of the family class, unless they are engaged to be married. [125] While most opposite-sex

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[121] *Immigration Act*, Part I, s. 3(c). See Regulatory Impact Analysis Statement, C. Gaz. 1997 II. 854 "Family Reunification is one of the key objectives of the Immigration Act whereby Canadian citizens and permanent residents may sponsor applications for permanent residence in Canada made by relatives who are members of the family class."

[122] Immigration Regulations, 1978, as amended SOR/98-544, Section 2, defines "accompanying dependant" as "a dependant of that person to whom a visa is issued at the time a visa is issued to that person for the purpose of enabling the dependant person to accompany or follow that person to Canada, and if the dependant is the spouse of that person, who is at least 16 years of age at the time the visa is issued."

[123] SOR/85-225. Section 4(3) provides that the family class does not include a spouse who entered into the marriage primarily for the purpose of gaining admission to Canada as a member of the family class and not with the intention of residing permanently with the other spouse. (SOR/93-44, s. 4(F))

[124] Fiancée – para 6(1)(d) of the Regulations provides that a visa officer can issue a visa to a member of the family class in the case of fiancée if

(a) the sponsor and the fiancée intend to reside together permanently after being married, and did not become engaged primarily for the purpose of the finance gaining admission to Canada as a member of the family class,

(b) there are no legal impediments to the proposed marriage of the sponsor and the fiancée under the laws of the province in which they intend to reside, and

(c) the sponsor and the fiancée have agreed to marry within 90 days after the admission of the fiancée. (SOR/97-145, s. 3)

[125] In 1997, the definition of spouse was amended for the purposes of sponsorship. The definition was changed to include a person of the opposite sex who is cohabiting with the sponsor in a conjugal relationship at the time the sponsor gives an undertaking, having cohabited with the sponsor for a continuous period of at least one year. SOR/97-145 However, this expanded definition only applies for the purpose of the provisions relating to the co-signing of an undertaking. The See Regulatory Impact Analysis Statement, C. Gaz. 1997 II. 854 stated that the amendments are intended to bring the definition of spouse in line with the government's obligations under the Charter: "for the purposes of co-signing provisions only, a spouse includes a common-law spouse who is defined as a person of the opposite sex who has cohabited with the sponsor in a conjugal relationship for at least one year. This provision has been included to conform to the equality provisions of the Canadian Charter of Rights and Freedoms."

couples would be able to opt to marry in order to qualify,[126] same-sex couples have no similar option.

While the *Immigration Act* was not included in Bill C-23, the Minister of Citizenship has since introduced Bill C-31, the *Immigration and Refugee Protection Act*.[127] Although the Bill is primarily designed to toughen the immigration and refugee system,[128] the Minister has promised supporting regulations in the coming months that will expand the "family class". According to the Backgrounder Paper, this will include "modernizing the definition of family class to ensure consistency in accordance with government legislation under consideration – family class will include spouses, common-law and same-sex partners."[129]

The *Immigration Act* also allows Canadian citizens and permanent residents to sponsor family members for immigration to Canada. A Canadian citizen or permanent resident can sponsor a member of his or her "family class" for immigration to Canada. The objective of these family class sponsorship provisions is similar to the accompanying dependant provisions, namely, to recognize and protect the integrity of family relationships, by facilitating the reunion of family members. The *Act* has a broad definition of family class that allows an individual to sponsor a broad range of relatives under the family reunification program. "Family Class" is currently defined in section 1(5) of the Regulations (SOR/93-4) as including:

However, the Statement also recognizes the privitizing objectives that underlie the amendment: "...new measures to strengthen sponsorship will help protect immigrants from being abandoned by their sponsors as well as protect municipal, provincial and federal governments from being financially responsible for supporting family class immigrants who cannot support themselves". This amendment had the effect of broadening the category of persons who can assume responsibility for the support of immigrants within the family class, but does not expand the category of the family class itself. As such, it is as much about reducing welfare dependency through the privatization of support obligations as it is about maintaining the integrity of family relationships.

[126] Some opposite sex couples may have difficulty, due to a prior existing marriage, particularly if they are immigrating from a country with highly restrictive divorce laws.

[127] Bill C-31, 2nd Session, 36th Parliament, 48-49 Elizabeth II, 1999-2000.

[128] Through for example front-end security screening of all claimants, clarified grounds for detention, fewer appeals to delay the removal of "criminals", and the suspension of refugee claims for those charged with crimes until the courts have rendered a decision.

[129] Citizenship and Immigration Canada, "Opening the Front Door Wider" Backgrounder #2, News Release 2000-09. The amendments to the family class promised by the Minister of Citizenship will also broaden the definition of dependant child by increasing the age from 19 to 22.

(a) the sponsor's spouse;
(b) the sponsor's dependent son or dependent daughter;[130]
(c) the sponsor's father or mother;
(d) the sponsor's grandmother or grandfather;
(e) the sponsor's brother, sister, nephew, niece, grandson or granddaughter, who is an orphan and is under 19 years of age and unmarried;
(f) the sponsor's fiancée;
(g) any child under 19 years of age whom the sponsor intends to adopt and who is
    (i) an orphan
    (ii) an abandoned child whose parents cannot be identified
    (iii) a child born outside of marriage who has been placed with a child welfare authority for adoption
    (iv) a child whose parents are separated and who has been placed with a child welfare authority for adoption
    (v) a child one of whose parents is deceased and who has been placed with a child welfare authority for adoption, or
    (h) one relation regardless of age or relationship to sponsor where sponsor does not have a spouse, son, daughter, father, mother, grandfather, grandmother, brother, sister, uncle, aunt, nephew or niece who is a Canadian citizen, permanent resident or whose application for landing the sponsor may otherwise sponsor.

The rules for family class sponsorship thus recognize a broad range of relatives for potential sponsorship.

Finally, the *Immigration Act* also makes provision for a class of applicants known as "assisted relatives". "Assisted relatives" is part of the independent class of immigration applications (which also includes skilled workers). Independent immigrations are assessed against a series of selection criteria[131]. In addition, assisted relatives are awarded five bonus points.[132] Assisted relatives also need a guarantee of financial assistance from their Canadian relatives if they require

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[130] Prior to 1988, the family class consisted of parents and their dependent children up to 21 years of age and unmarried. In July 1988, family class was expanded to include all unmarried children, regardless of their age. In 1993, the regulations were amended to reduce the family class to encompass only those unmarried children who were 19 years of age or under, and those children over 19 years who were dependent, either as a result of being students or of having some kind of physical or mental disability. The amendments to 'family class' promised by the Minister will again revise the age from 19 to 22 years.

[131] Points are allocated according to a range of factors including Education, Specific Vocational Preparation, experience, occupation demand, arranged employment or designated occupation, demographic factor, age, knowledge of English and French languages and personal suitability.

[132] Prior to 1993 assisted relatives were awarded more bonus points (15 for brothers, sisters and married children; ten bonus points for more distant relations. The bonus points made it relatively easy for assisted relatives to achieve the total 70 point pass mark. Thus large numbers of applicants could qualify as assisted relatives because of the bonus points they received. An amendment to the Regulations, SOR/93-44, January 1993 reduced the bonus points awarded to assisted relatives.

help in settling. Assisted relative is defined as "a relative other than a member of the family class, who is an immigrant and is an uncle or aunt, a brother or sister, a son or daughter, a nephew or niece or a grandson or granddaughter of a Canadian citizen or permanent resident who is at least 19 years of age and who resides in Canada".[133]

The *Immigration Act* thus recognizes a broad range of familial relationships. While the Act provides differing degrees of protection to these different relationships, the objectives of all three categories (accompanying dependant, family class and assisted relative) are similar. The Act seeks to recognize and protect the integrity of family relationships, by facilitating the reunion of family members.

(b) *Canada Evidence Act* - Spousal Competence, Compellability and Privilege

Section 4 of the *Canada Evidence Act*[134] has been justified on the grounds that it is designed to protect and promote the integrity of ongoing interdependent relationships. To understand the effects of section 4, it is necessary to begin with an understanding of the common law rules it preserves with some alterations.

At common law, the accused person and his or her spouse are incompetent to testify. There are exceptions to the rule that enable spouses to testify for the prosecution if the charge involves an injury or threat of injury to the spouse or a child,[135] or in any case in which the spouses are irreconcilably separated.[136] Section 4 of the *Canada Evidence Act* has added a number of other exceptions to the common law rule of incompetence. Section 4(1) makes an accused person and his or her spouse competent to testify for the defence. Sections 4(2) and 4(4) make spouses competent and compellable to testify for the prosecution when the accused is charged with specified

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[133] SOR/93-44 1993.

[134] R.S.C. 1985, c. C-5.

[135] J. Sopinka, S.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada* (Toronto and Vancouver: Butterworths, 1999) at 699, 701.

[136] *R. v. Salituro*, [1991] 3. S.C.R. 654.

offences, including sexual offences against children or youth, vagrancy, prostitution-related offences, sexual assault, polygamy, and various crimes of violence involving victims under the age of 14 years. These sections preserve the common law rule that spouses are not competent to testify for the prosecution with the exception of the listed offences, in which case they are both competent and compellable. In other words the statutory scheme seeks to accomplish "in a rough fashion" a balance between "the competing interests of the need for the court to receive relevant information about a crime and the need to foster marital harmony and to protect a confidential relationship."[137] Even if a spouse is testifying because he or she is competent pursuant to the common law exceptions or the statutory exceptions in s.4(2) or s.4(4), s.4(3) sets out a privilege that permits a witness spouse to refuse to answer questions about communications with his or her spouse during the marriage.

2. Recognizing the Potential Existence of Shared Economic Interests in Relationships of Caring and Commitment.

A wide range of federal statutes recognize that the economic and emotional interdependence that accompanies many adult personal relationships may give rise to shared interests or conflicts of interest at odds with the accomplishment of federal legislative objectives. For example, the premise of a trial by jury is that the Crown and the accused are entitled to have the evidence assessed dispassionately by impartial representatives of the community. Actual impartiality and the appearance of impartiality are both necessary to the maintenance of public confidence in the criminal justice system. If a member of the jury has a personal relationship with a participant in the trial, his or her ability to assess the evidence fairly and impartially may be called into question. For this reason, section 632(b) of the *Criminal Code* gives the judge presiding over a jury trial the

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[137] Sopinka et al, *supra* note 135, at 703-4.

discretion to excuse any juror from service if the juror has a "relationship with the judge, prosecutor, accused, counsel for the accused or a prospective witness".[138]

Federal statutes that regulate financial institutions reflect a similar concern with ensuring that transactions with related parties do not give rise to preferential treatment or the appearance of preferential treatment. Parliament has prohibited banks from entering transactions with related parties unless standards and procedures designed to minimize the risk of partiality are followed. The *Bank Act* provides that "a bank shall not, directly or indirectly, enter into any transaction with a related party of the bank."[139] A related party includes minor children, spouses and common law partners of directors, senior officers or significant shareholders.[140] The prohibition on entering transactions with related parties is subject to a number of exceptions that are extensively regulated by the Act.[141] Similar provisions can be found in the *Business Development Bank of Canada Act*,[142] the *Canada Cooperatives Act*,[143] the *Cooperative Credit Associations Act*,[144] the *Insurance Companies Act*,[145] and the *Trust and Loan Companies Act*.[146]

A presumption that certain personal relationships give rise to shared economic interests animates a number of federal statutes that regulate corporate takeovers, corporate returns and

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[138] R.S.C., 1985, c. C-46, s. 632.

[139] S.C. 1991, c. 46, s.489(1).

[140] *Ibid.* s.486(1) as amended by Bill C-23, s.7.

[141] *Ibid.* sections 489-506.

[142] S.C. 1995, c.28. Section 31 defines interested persons as including spouses, common law partners (Bill C-23, s.26), children, siblings or parents of a director. Section 32 prohibits the bank from granting a loan to a director. Section 33 provides that close relatives of directors who apply for loans must disclose that they are interested persons, and a loan to an interested person can be made only after approval of the board at a meeting where the director related to the applicant is absent.

[143] S.C. 1998, c.1. Section 2(1) defines an associate as including a spouse, common law partner (Bill C-23, s.28), child, and any person related by blood or marriage with whom a person resides. Section 160 restricts the ability of a cooperative to enter transactions with associates.

[144] S.C. 1991, c.48. In Part XII (self-dealing), the definition of related parties in s.410(1) includes minor children, spouses and common law partners (Bill C-23, s.86). Section 413(1) restricts transactions that associations can enter into with a related party.

[145] S.C. 1991, c.47. In Part XI (self-dealing), the definition of related parties in s.518(1) includes minor children, spouses and common law partners (Bill C-23, s.158). Section 521 restricts transactions that companies can enter into with related parties.

insider trading. For example, the *Bank Act* defines a takeover bid as a bid by an offeror and his or her associates to take control of over ten per cent of the shares of a bank. If this threshold is met, certain regulatory provisions are triggered. Section 283(1) defines associates as including children, spouses, and common law partners of an offeror, as well as persons related to the offeror by blood or marriage who share a residence with the offeror.[147] Similar provisions can be found in the *Canada Business Corporations Act*,[148] the *Trust and Loan Companies Act*,[149] and the *Insurance Companies Act*.[150] In the *Corporations Returns Act*, the information that must be included in corporate returns depends on the situation of affiliated corporations, which includes corporations controlled by a related group.[151] Section 2(1) defines a related group as persons related by blood, marriage, common law partnership or adoption.[152] The *Canada Corporations Act* prohibition on insider trading applies to insiders and associates of insiders.[153] The definition of associates includes children, spouses, and common law partners of an insider, as well as persons related to the insider by blood or marriage who share a residence with the insider.[154]

The presumption of shared interests in personal relationships is the rationale underlying federal laws that prohibit nepotism in hiring,[155] restrict persons' ability to vote on or act in relation to matters concerning a relative's economic interests,[156] put family members' claims on a bankrupt

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[146] S.C. 1991, c.45. The definition of related parties in s.474(1) includes minor children, spouses and common law partners (Bill C-23, s.302). Sections 477-89 prohibit transactions with related parties subject to certain exceptions.

[147] S.C. 1991, c.46, s.283(1) as amended by Bill C-23, s.4.

[148] R.S.C. 1985, c.C-44. Section 2(1) defines associate as including a spouse, common law partner (Bill C-23, s.27), child, as well as persons related to the offeror by blood or marriage who share a residence with the offeror. This definition affects the definition of a takeover bid in s.194 of the Act.

[149] S.C. 1991, c.45, s.288(1) as amended by Bill C-23, s.299.

[150] S.C. 1991, c.47, s.2(1), s.307(1) as amended by Bill C-23, s.154.

[151] R.S., 1985, c.C-43, s.3.

[152] *Ibid.* as amended by Bill C-23, s.87.

[153] R.S.C. 1970, c.C-32, s.100.4.

[154] *Ibid.* s.100(1) as amended by Bill C-23, s.29.

[155] *Canada Elections Act*, R.S.C. 1985, c.E-2, s.15(1) (returning officer cannot hire close family member as assistant; includes parents, spouses, common law partners (Bill C-23 s.31), siblings, and children).

[156] *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, s.4 as amended by Bill C-23, s.4 (related persons includes persons related by blood, marriage, common law partnership, or adoption); s.13.30 (trustee cannot act in relation to

person's estate in a subordinate position,[157] and call into question the validity of commercial transactions between related persons.[158]

A particularly important example of a provision that calls into question the validity of transactions between related persons is s.5(2)(i) of the *Employment Insurance Act*.[159] We have selected this provision for detailed examination because it employs relational definitions to limit entitlement to important social benefits for many unemployed persons.

In order to qualify for unemployment benefits pursuant to the *Employment Insurance Act*, claimants whose employment has been terminated must have worked for the required number of hours in insurable employment. Section 5(2)(i) provides that employment is uninsurable if the employer and employee were not dealing with each other at arm's length. The objective of this provision is to prevent people from fraudulently claiming unemployment benefits by manufacturing fictitious or artificial employment relationships.

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the estate of a debtor with whom the trustee is related without permission of the court); s.54(3) as amended by Bill C-23, s.8 (related creditor may not vote in favour of a proposal); s.66.19(2) (creditor related to a consumer debtor may not vote in favour of the acceptance of a consumer proposals); s.113(3): as amended by Bill C-23, s.13 (spouses, common law partners, siblings, parents, children, uncles, aunts of bankrupt cannot vote for the appointment of trustees or inspectors); *Business Development Bank of Canada Act*, S.C. 1995, c. 28, s.31, s.33 as amended by Bill C-23 s.26 (director cannot vote on an application by an interested person, which includes a spouse, common law partner, child, sibling, parent, and parent and siblings of spouse or common law partner). See also *Investment Canada Act*, R.S.C. 1985, c. 28 (1st Supp.), s.3 (defining 'voting group' for the purposes of determining whether an entity is controlled by Canadians; includes two or more persons who, because of a personal relationship, would ordinarily be expected to act together).

[157] *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, s.137(2) as amended by Bill C-23, s.15 (spouse, former spouse, common law partner, or former common law partner cannot claim wages before other creditors); s.138 as amended by Bill C-23, s.16 (claims by spouses, common law partners, parents, children, siblings, aunts and uncles for wages cannot be preferred).

[158] *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.), s.48 (the value of goods for the purposes of calculating duty is the transaction value so long as the parties are not related, or, if they are related, if the relationship did not influence the price paid; s.45(3) as amended by Bill C-23, s. 96 (related persons defined as persons related by blood, marriage, common law partnership or adoption). *Bankruptcy and Insolvency Act*, R.S., 1985, c. B-3, s.4(2) as amended by Bill C-23, s.8 (related persons includes persons related by marriage, common law partnership, blood or adoption; s.3(3) (related parties are deemed not to deal with each other at arm's length); s.3(2) (whether a transaction is arm's length when between unrelated persons is a question of fact). *Excise Tax Act*, c.E-15, s.2(2.2) (related persons means persons related by blood, marriage, common law partnership or adoption); s.2.1(a) (related persons are deemed not to deal with each other at arm's length); s.2.2(b) (whether a transaction between unrelated persons is at arm's length is a question of fact); s.21.14, s.21.25 (calculation of value of service provided to person not at arm's length); s.325 as amended by Bill C-23, s.112 and Sch. 1, s.1 (transfer of property between spouses or common law partners deemed to be not at arm's length). *Special Import Measures Act*, R.S.C, 1985, c. S-15, s.2(2)-(4) as amended by Bill C-23, s.291 (associated persons includes persons related to each other by blood, marriage, common law partnership or adoption, or unrelated persons not dealing with each other at arm's length); value of goods determined differently in transactions between associated persons.

According to section 3(2), the question of whether persons are not dealing with each other at arm's length is to be determined by reference to s.251 of the *Income Tax Act*:

> 251. (1) For the purposes of this Act; (a) related persons shall be deemed not to deal with each other at arm's length; and (b) it is a question of fact whether persons not related to each other were at a particular time dealing with each other at arm's length.

Until 1993, the *Income Tax Act* defined related persons as persons related by blood relationship, marriage or adoption. Parliament added common law opposite-sex couples to the definition in 1993, and Bill C-23 will add same-sex couples in 2000.[160]

Without more, the combined effect of s.251(1)(a) of the *Income Tax Act* and s.5(2)(i) of the *Employment Insurance Act* would be to deprive all employees who work for a related person of their entitlement to unemployment benefits upon termination of their employment. This was, in fact, the situation prior to 1990. Recognizing the harshness of an irrebutable presumption that employment between relatives is not "real employment", Parliament amended the Act in 1990.[161] The amendment, now s.3(2)(c)(ii) of the *Employment Insurance Act*, gives the Minister a discretionary power to treat employment by a relative as insurable employment if the Minister "is satisfied that, having regard to all the circumstances of the employment, including the remuneration paid, the terms and conditions, the duration and the nature and importance of the work performed, it is reasonable to conclude that they would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length." The effect of the amendment is that employment by a relative is not automatically assumed to be fictitious and therefore excluded from the definition of insurable employment. Employment by a related person will be considered insurable if, after a careful examination of the circumstances, the Minister concludes the arrangement constituted a "real" contract of employment.

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[159] S.C. 1996, c. 23.

[160] Bill C-23, s.140 and sch. 2, s.10. Section 251(2) now reads: "For the purpose of this Act, "related persons", or persons related to each other, are (a) individuals connected by blood relationship, marriage, common law partnership or adoption..."

[161] S.C. 1990, c.40.

The 1990 amendment recognizes that an employee's work for a family member may be perfectly legitimate, and, upon termination, the employee may have an equally valid and pressing need for unemployment benefits. Nevertheless, we believe that the use of relational terms in the insurable employment provisions of the Act ought to be abandoned entirely. The use of relational terms is not necessary to the policy objective of preventing fraud. Moreover, the use of relational terms to determine entitlement has a negative impact on relational privacy and may discourage the formation of relationships of caring and commitment. We will pursue these arguments further in Section C below.

3. Tailoring financial benefits or penalties to recognize the consequences of economic dependence or interdependence

A wide range of federal statutes seek to tailor benefits or penalties in a manner that takes into account the emotional and economic interdependence that accompanies family relationships. For example, the amount of support that is available to farmers pursuant to the *Agricultural Marketing Programs Act*[162] will be reduced if related farmers have received support. Farmers are related if they are living together ("cohabiting", whether or not in a conjugal relationship)or if they are related by blood, marriage, common law partnership or adoption.[163] Similarly, a number of offence provisions in federal statutes provide that the calculation of the financial penalty to be imposed after a person has benefited from an improper transaction (such as bribery), take into account benefits received by family members.[164]

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[162] S.C. 1997, c. 20.

[163] Section 3(2) of the Act presumes that producers are not dealing with each other at arm's length (and therefore are "related producers" if they are cohabiting, or if they are connected by blood, marriage, common law partnership or adoption (as amended by Bill C-23, ss.2-3). The presumption can be rebutted by the presentation of evidence to the contrary. The amount of support available to producers takes into account support provided to related producers: see sections 9, 10, 16, 18 and 20 of the Act.

[164] See, e.g., section 675(3) of the *Bank Act*, S.C. 1991, c. 46 (permits the imposition of an additional fine for the commission of an offence under the Act in an amount equal to the monetary benefits received by the offender or his or her spouse, common law partner, or "other dependent"); s.466(3) of the *Cooperative Credit Associations Act*, S.C. 1991, c. 48, s.706(3) of the *Insurance Companies Act*, S.C. 1991, c. 47, and s.534(3) of the *Trust and Loan Companies Act*, S.C. 1991, c. 45 (size of fine that can be imposed for violating these Acts tailored to benefit received by offender and his or her "dependants"); s.121(1) of the *Criminal Code*, R.S.C. 1985, c.C-46 (includes in the

Relational concerns may sometimes cut in the other direction, leading to a reduction in the size of a penalty or a narrower definition of offences if they would otherwise interfere with an offender's ability to meet the needs of family members. For example, a court is not to make an order imposing a "victim fine surcharge" on a convicted offender if it would result in "undue hardship to the offender or the dependants of the offender".[165] Similarly, it is not an offence to brew beer or grow tobacco without a licence so long as the beer or tobacco is for personal or family consumption.[166] Similarly, exemptions to firearms offences are provided for persons hunting or trapping for the purposes of family sustenance.[167] These exemptions reflect a view that meeting the needs of interdependent family units is more important than, or not in conflict with, the public safety goals of the offences.

Pension laws are a significant area in which federal legislation employs relational criteria in an attempt to recognize the consequences of economic dependence or interdependence that may exist in adult personal relationships. We will outline the features of the complex array of federal statutes in this area. These statutes can be divided into four categories according to the purposes they serve. First is the *Canada Pension Plan*, a compulsory social insurance scheme that provides benefits to employee contributors and their families. Second is a large group of federal statutes establishing employment pension plans for particular sectors of the federal public service, such as the *Public Service Superannuation Act*. We will consider, as part of this second group, the statutes that provide disability benefits (the *Pension Act*), employment pensions (the *Canadian Forces Superannuation Act*) and old age supplementary pensions (the *War Veterans Allowance Act*) to members of the armed forces and their families. The third category is pension standards legislation, the *Pension Benefits Standards Act*, which establishes minimum requirements for employment

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definition of "frauds on the government" gifts to government officials or their family members); s.117 of the *National Defence Act*, R.S.C. 1985, c.N-5 (offence to attempt to peddle influence by accepting gifts personally or through any member of one's family).

[165] Section 737(2) of the *Criminal Code*, R.S.C. 1985, c.C-46.

[166] Sections 176(1) and 227 of the *Excise Act*, R.S.C. 1985, s.E-14.

pensions provided by private sector employers whose activities are federally regulated. Legislation in these first three categories create pension entitlements for employees and their families. The focus of our analysis will be on the rules determining entitlements to survivors' benefits, since this is the most important area in which the employment pension statutes use relational criteria. The fourth category is the universal old age pension scheme established by the *Old Age Security Act*. We will examine in some detail the use of relational criteria in this Act to determine eligibility for a monthly allowance in the years leading up to pension entitlement at age 65, and to determine eligibility for the guaranteed income supplement for low income pensioners.

(a) The *Canada Pension Plan*

The *Canada Pension Plan* establishes a national scheme of old age pensions and supplementary benefits related to employment. It is a contributory scheme financed by employers and payroll deductions from employees. The Plan provides retirement benefits to contributors over the age of 60 and disability benefits to contributors under the age of sixty. Relational criteria, however, are taken into account in two circumstances: divorce, which we discuss below[168] and death of the employee contributor. In the latter case, spouses or common law partners are entitled to claim a pension as "survivors". Factors such as age, responsibility for dependent children, and disability determine a claimant's entitlement to, and the amount of, the survivor's pension.[169]

The CPP survivor's pension has evolved considerably from its original form in a manner that mirrors changing social attitudes to conjugal relationships. When the Plan first came into force in 1966, the survivor's pension was called a "widow's pension".[170] The scheme of the legislation makes clear that the widow's pension was premised on an assumption that married women were

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[167] Sections 91(5), 94(5) and 113(1) of the *Criminal Code*, R.S.C. 1985, c.C-46.

[168] *Supra* at notes 264-266.

[169] See the discussion in Carol Rogerson, "Couples or Individuals or Parents? Rethinking the Appropriate Unit for the Allocation of Social Benefits", Domestic Partnerships Conference Papers (Queen's University, 1999) at 324; *Law v. Canada*, [1999] 1 S.C.R. 497.

[170] *Canada Pension Plan*, S.C. 1964-65, c.51, s.56.

homemakers who were financially dependent on their breadwinner husbands. The widow's pension was gender-specific. It was not available to widowers. If a widow remarried, her new husband was presumed to be meeting her needs for financial support. Her widow's pension would automatically terminate.[171] The original CPP gave limited recognition to the needs of women living in common law relationships with male contributors. The Minister did have discretion to award a widow's pension to a surviving common law spouse. She had to establish that she had "been maintained" and "publicly represented by the contributor as [his] spouse" for seven years (if either the deceased or the claimant were married to someone else) or for an unspecified number of years (if neither was married).[172]

Enacted prior to the liberalization of divorce law, the original CPP expressed a clear preference for the claims of separated wives over those of women cohabiting in conjugal relationships with the widows' husbands. A wife's claim to the widow's pension could be displaced by a common law spouse only after seven years of cohabitation in a relationship of dependency, and then only if the ministry considered it appropriate. The legislation put in place an all or nothing entitlement that could operate harshly on wives and common law spouses. The original CPP did not make provision for apportioning the widow's pension between a deceased contributor's wife and his common law spouse. This problem continues to exist in the current CPP and can give rise to significant injustice.

In the early 1970s, the ascendance of formal notions of liberal equality demanded gender neutrality in federal statutes. In 1974, the CPP widow's pension became a survivor's pension available to the wife or husband of a deceased contributor.[173] The discretion to award the survivor's pension to a common law spouse remained. The period of cohabitation required before a common law spouse's claim could be considered was reduced to three years (if either of the cohabitants was

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[171] *Ibid.* s.62.

[172] *Ibid.* s.63.

[173] *An Act to amend the Canada Pension Plan*, 1974-75-76, c. 4, s.29.

married) or one year (if neither was married), and the exclusion of common law spouses who were not dependent on the deceased contributor was dropped.[174]

After 1974, the objective of the CPP survivors' pensions was no longer as clear as it had been in 1966. The aim of the 1966 widow's pension was to address the consequences of the presumed dependency of wives on their husbands. After 1974, this dependency rationale could no longer provide the sole explanation of the survivor's pension provisions. Few widowers were dependent on their wives' income the way wives were on their husbands' income. And common law spouses could claim a survivor's pension whether or not they were dependent on the deceased's income. Beginning in 1974, CPP survivors' pensions are best understood as serving two objectives: compensating dependent spouses for the sudden loss of their spouses' income and compensating interdependent spouses for their contribution to the employment earnings of their spouses. The first objective responds to spousal need. The second objective responds to earned spousal entitlement. Just as family law has embraced a compensatory understanding of the role of spousal support orders,[175] the legal structure of CPP survivors' pensions since 1974 reflects an understanding that a spouse's employment earnings have been made possible by the support and work of the other spouse. Individual employment earnings have been earned, in this sense, by both spouses. We will refer to these dual objectives underlying CPP survivors' pensions as the dependence and compensatory objectives.

In 1986, the position of common law spouses was significantly strengthened. They became automatically entitled to CPP survivor's pensions if they had cohabited with the deceased for at least one year, even if the deceased also left a surviving wife or husband.[176] With the passage of Bill C-23, same-sex couples will be in the same position as opposite-sex common law couples. A survivor will be defined as the common law partner of the contributor at the time of the contributor's death, or,

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[174] *Ibid.* s.30, amending s.63 of the *Canada Pension Plan.*

[175] See, e.g., *Moge* v. *Moge*, [1992] 3 S.C.R. 813.

[176] R.S.C. 1985, c. 30 (2nd Supp.), s.1, adding a definition of spouse to s.2 of the CPP.

if there is no common law partner, the person who was married to the contributor at the time of death.[177] The CPP still does not contain a provision allowing for the apportionment of a survivor's pension where a contributor leaves both a separated spouse and a common law partner. Rather, the common law partner receives the entire survivor's pension, even if the common law partnership was brief and the marriage long. The absence of a just apportionment scheme raises the stakes too high in the inevitable unseemly contests that can arise between two surviving spouses.[178] Moreover, the complete denial of a survivor's pension to a separated wife or husband when the other spouse has formed a new common law partnership is plainly inconsistent with the compensatory objective of survivors' pensions. In our view, the absence of apportionment provisions from the CPP violates the *Charter*'s prohibition on marital status discrimination.[179]

(b) Pension Plans for Federal Public Employees

Pension plans for federal public employees are established by a number of federal statutes, including the *Canadian Forces Superannuation Act*,[180] the *Defence Services Pension Continuation Act*,[181] the *Governor General's Act*,[182] the *Judges Act*,[183] the *Lieutenant Governors Superannuation Act*,[184] the *Members of Parliament Retiring Allowances Act*,[185] the *Public Service Superannuation*

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[177] Bill C-23, s.44(3).

[178] See, e.g., *Fraser* v. *Canadien National*, [1999] J.Q. no. 2286 (S.C.) and *Smades* v. *Canada (Minister of Employment and Immigration)*, [1995] F.C.J. No. 544 (C.A.) (in both cases, the surviving wives argued that their husbands' cohabitants were not spouses for the purposes of entitlement to survivor's benefits).

[179] The Alberta Queen's Bench reached the opposite conclusion in *McLeod* v. *Canada*, [1993] A.J. No. 975. The court reasoned that (1) marital status is not a ground of discrimination prohibited by the *Charter*, (2) the legislation "represents an attempt to sensibly apportion benefits to the person who was dependent on the deceased contributor at the time of death" (para. 42), and (3) in light of the administrative costs, it is reasonable "to give the benefit to one person instead of splitting it among multiple beneficiaries." (para. 44). The first argument has since been rejected by the Supreme Court in *Miron* v. *Trudel*, [1995] 2 S.C.R. 418. The second ignores the fact that survivors' pensions now serve compensatory as well as dependency objectives. The third argument is unconvincing, especially now that apportionment schemes have been added to most other federal pension laws.

[180] R.S.C. 1985, c.C-17.

[181] R.S.C. 1970, c.D-3.

[182] R.S.C. 1985, c.G-9.

[183] R.S.C. 1985, c.J-1.

[184] R.S.C. 1985, c.L-8.

[185] R.S.C. 1985, c.M-5.

Act,[186] the *Royal Canadian Mounted Police Pension Continuation Act*,[187] and the *Royal Canadian Mounted Police Superannuation Act*.[188] Entitlement to a pension, as is the case with the CPP, is determined on an individual basis calculated by reference to an employee's contributions and length of service. In addition to these employment pension plans, the *Pension Act*[189] establishes pensions to compensate members of the armed forces who have been disabled or have died as a result of military service, and the *War Veterans Allowance Act*[190] provides for supplementary old age pensions for war veterans. All of the above statutes provide for survivors' benefits to be paid on the death of the federal employee or veteran. After Bill C-23, benefits will be payable to a surviving spouse or common law partner of the deceased contributor or veteran.

The eligibility criteria for the receipt of benefits by adult survivors, and the objectives of adult survivor benefits, have evolved in a manner comparable to the changes in the CPP described above. Up until the 1970s, adult survivor benefits were widows' pensions, terminable upon the widow's remarriage. Typically a common law wife had no right to a widow's pension, but she might be granted a widow's pension if she had cohabited with the deceased for a lengthy period of time, had been maintained by him and held out to the public as his wife. These were the essential features of the scheme adopted, for example, in the original versions of the *Pension Act* (1919),[191] the *Public Service Superannuation Act* (1953)[192] and the *Canadian Forces Superannuation Act* (1959).[193] It is evident that widows' right to receive benefits pursuant to their husbands' employment pension plans was premised on a "family wage" dependency model. The objective was to respond

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[186] R.S.C. 1985, c.P-36.

[187] R.S.C. 1970, c.R-10.

[188] R.S.C. 1985, c.R-11.

[189] R.S.C. 1985, c.P-6.

[190] R.S.C. 1985, c.W-3.

[191] S.C. 1919, c.43.

[192] S.C. 1952-53, c.47.

[193] S.C. 1959, c.21.

to the sudden loss of income by a homemaker wife who had been entirely dependent on her husband's income and, upon his death, had little earning power of her own.

Over the course of the last thirty years, survivors' benefits in federal employment and veterans' statutes have been continually reformed as the material and ideological premises of the dependency model have eroded. Women's participation in paid employment has increased steadily and dramatically since the 1950s. Women's labour participation rates remained flat at roughly 20% for the first half of the twentieth century. The climb that began in the 1950s passed 40% in the 1970s and reached 60% in the 1990s.[194] Married women's labour participation rates have followed the overall trend. This is true even for mothers of young children. For example, even when there were three or more children under the age of six in the family, roughly half of married women held paid employment in 1990, up from roughly one fifth in 1970.[195] Another force of change has been the enactment of legal guarantees of equal treatment on the basis of sex, marital status and sexual orientation. Since the 1970s, spousal interdependency has steadily replaced women's dependency as the dominant assumption underlying legal understandings of marital relations.

In the 1970s, widows' pensions became survivors' pensions that could be claimed by common law spouses after a shorter period of cohabitation regardless of whether they had been dependent upon the deceased. In the 1980s and 1990s, the rights of common law spouses were placed on the same footing as surviving wives and husbands, and the required period of cohabitation was reduced to one year. With the passage of the *Public Sector Pension Investment Board Act*[196] in 1999 and the expected passage of the *Modernization of Benefits and Obligations Act* in 2000, same-sex partners of deceased contributors or veterans can now claim survivors' benefits. A survivor who remarries or forms a new common law partnership no longer has to surrender his or her survivor's benefits. If the deceased lived with a common law partner at the time of his or her

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[194] Morley Gunderson, *Women and the Canadian Labour Market: Transitions Towards the Future* (1998) at 24.

[195] Jaël Mongeau, "The Living Conditions of Families: Income and Labour Force Activity", in Y. Péron et al. eds., *Canadian Families at the Approach of the Year 2000* (1996) 235 at 250.

death, and also had a surviving spouse, then the survivor's benefits are divided between the two in proportion to the number of years they cohabited with the deceased.

These changes in federal pension laws have not followed a consistent timetable or pattern. Some statutes abandoned the elements of the marital dependency model belatedly if at all. Clearly, legislators have found their way to recognizing non-marital relationships more readily in some contexts than others. For example, that soldiers might have common law wives was acknowledged in 1919; that a Prime Minister, judge, Lieutenant Governor or Governor General might have a common law partner was a prospect that Parliament could not face 80 years later.[197] One of the positive aspects of Bill C-23 is that it will introduce greater uniformity into the previously haphazard treatment of survivor's benefits in federal pension statutes for employees and veterans. The exception is the *War Veterans Allowance Act*, a statute that has been peculiarly resistant to modernizing trends over the years. Even after Bill C-23, a veteran's survivor who remarries or forms a new common law partnership loses his or her entitlement to survivor benefits. The Minister retains discretion to deny a survivor's benefit to a separated spouse. Parliament should remove these anachronisms and bring the *War Veterans Allowance Act* into line with the contemporary approach.

The current model of employment pension survivors' benefits, like the CPP survivors' pensions, is premised on a combination of dependency and compensatory rationales. The dependency rationale has been eroded, but it is not obsolete. Some spouses or partners, particularly women who worked in the home during long-term relationships with breadwinner men, still require economic support to cushion the economic blow they suffer on the sudden loss of their only source of income. The dependency rationale, however, can no longer be the sole objective underlying the current regime of survivors' benefits. Survivors can claim benefits regardless of need, even if they cohabited with the deceased for little more than a year, and even if they have since formed a new conjugal relationship. Even economically self-sufficient spouses or partners facilitated

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[196] S.C. 1999, c.34.

the employment earnings of their mates by living with them in relationships of caring and commitment. The surviving spouse or partner contributed indirectly to the deceased's earned employment entitlements, a role for which he or she deserves compensation. Hence the justice of dividing the benefit among multiple claimants in proportion to the number of years they lived with the deceased.

In our view, the dependency and compensatory objectives are both valid and justify the continued use of relational criteria in legislation governing survivors' benefits in employment pension plans. What remains to be considered is whether these objectives could be better accomplished if persons other than spouses and common law partners were entitled to claim survivors' benefits. We will pursue this issue below.

(c) Pension Standards Legislation

The federal legislation regulating employment pension plans at private sector workplaces within federal jurisdiction is the *Pension Benefits Standards Act*.[198] The Act sets out minimum standards that pension plans are required to meet. One of these requirements is the provision of survivor benefits to spouses or common law partners.[199] After Bill C-23, a survivor's benefit must be made available to the common law partner at the time of the employee's death, or if there was no common law partner the employee's spouse. For an employee without a spouse or common law partner, there is no obligation to provide a survivor's benefit. The benefit cannot be terminated upon remarriage or the formation of a new common law partnership.[200] In contrast to the pension statutes governing its own employees, the Act does not require private employment pensions to provide for

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[197] These omissions from the 1999 reforms (*Ibid.*) will be addressed by Bill C-23.

[198] R.S.C. 1985, c.32 (2nd Supp.).

[199] *Ibid.*, s23, as amended by Bill C-23, s.264.

[200] *Ibid.*, s.24, as amended by Bill C23, s.257.

division of the survivor benefits between a surviving spouse and common law partner. Instead, the legislation provides that the common law partner's claim displaces the claim of a spouse.[201]

(d) Old Age Pensions

The *Old Age Security Act*,[202] first introduced by the federal government in 1951, provides a pension entitlement to all residents of Canada over the age of 65. It was initially a universal entitlement calculated without regard to the needs or resources of a particular recipient. Since 1989, the old age pension is indirectly subject to an income test: the *Income Tax Act* recovers all or part of the pension from persons with high incomes. Despite the individual nature of the old age pension entitlement, there are several supplemental aspects of the legislation that rely on relational criteria. Both are attempts to provide additional financial support to the elderly or near-elderly poor since the basic old age pension entitlement is not adequate to meet subsistence needs.

The first is the Guaranteed Income Supplement (GIS), introduced in 1966.[203] The amount of the monthly GIS an eligible pensioner receives is determined by his or her relational status. The Act sets out two basic rates as the maximum entitlements that form the starting point for GIS calculations.[204] We will label these the "single rate" and the "conjugal rate".[205] The single rate is significantly higher[206] than the conjugal rate,[207] on the assumption that the combined living expenses of cohabiting pensioners are less than double that of single pensioners because of economies of scale. After Bill C-23, the single rate will apply to pensioners who are single, widowed, divorced, separated, living with others in non-conjugal relationships, or living with a spouse or common law partner who is not a pensioner. The conjugal rate will apply when two pensioners live together and

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[201] See, *ibid.*, s.2(1) (definition of spouse), and the new definitions of spouse, common law partner and survivor that will be added to the Act by Bill C-23, s.254(3).

[202] R.S.C. 1985, c.O-9.

[203] R.S. 1966-67, c.65, s.3.

[204] R.S.C. 1985, c.O-9, s.12(1).

[205] Section 12(1)(a) and (b), respectively, as amended by Bill C-23, s.207(1)(a).

[206] $499.55 per month as of April 1, 2000.

are spouses or common law partners. The basic rates are then reduced by a formula that takes into account the income of the applicant pensioner if he or she does not live with a spouse or partner, and that takes into account the combined income of the applicant pensioner and his or her spouse or partner if the applicant is living in a marital or conjugal relationship. The assumption underlying the GIS formula is that spouses and partners pool their resources. Hence, it is the aggregate income of an applicant and his or her spouse/partner that determines whether an applicant is entitled to a supplement and, if so, at what amount.

The 1966 version of the GIS did not recognize common law spouses. It treated all pensioners living with others outside of marriage as individual applicants. They could claim the higher basic rate for singles, and they did not have to pool incomes for the purposes of determining the amount of their monthly entitlement. Since 1998, a pensioner living in a conjugal relationship with a person of the opposite sex is subject to the calculations previously restricted to married pensioners,[208] and Bill C-23 will accomplish the same result for same-sex conjugal partners.[209] The Act used to treat cohabiting pensioners more favourably if they were not married. Now it will treat cohabiting pensioners more favourably if they cohabit in non-conjugal relationships.

The second part of the Act that employs relational criteria is the spousal allowance, first enacted in 1975, to be renamed the "monthly allowance" by Bill C-23.[210] The spousal allowance is available to spouses who are over the age of 60 and under the age of 65, and who are living with an older spouse or partner who is a pensioner. Entitlement to, and the amount of, the allowance is based on an income test similar to that employed in the GIS provisions.

The 1975 legislation was the first federal statute to give common law spouses the same rights as husbands and wives. It did not, however, give rights to anyone other than spouses. Low

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[207] $325.39 per month as of April 1, 2000.

[208] 1998, c.21, ss. 108-11.

[209] Bill C-23, ss.192-209.

[210] *Ibid.*, s.195.

income persons over the age of 60 but not yet 65 could not claim an allowance if they were not living with a pensioner spouse. The excluded group included persons who were single, divorced, separated or widowed.

Parliament expanded the entitlement of widows incrementally over the years. Initially, a widow was cut off the spousal allowance if her pensioner spouse died. In 1978, legislation provided that widows could continue to receive spousal allowances for six months after they became widowed.[211] As of 1979, spousal allowance recipients who became widowed would not be cut off their OAS/GIS entitlement at all.[212] And in 1985, all widows over the age of 60 could claim a spousal allowance even if they became widowed before the age of 60.[213] In contrast, Parliament has done nothing for the near elderly poor who are single, divorced or living with others in non-conjugal relationships, and next to nothing for separated spouses.[214]

Members of the near elderly poor cannot claim a monthly allowance if they have cohabited with a pensioner in a non-conjugal relationship, or if they are single, divorced, or separated from their spouses or partners. The monthly allowance thus represents a significant departure from the philosophy of universal, individual entitlement that inspired the original *Old Age Security Act*. By distributing benefits according to marital/conjugal status, it also represents a significant departure from the goal of directing old age pensions to seniors with the greatest needs (defined by income tests) that animates the current OAS/GIS scheme.

The objective of the monthly allowance is to compensate for the hardship that results from the loss of income in dependency relationships upon the breadwinner's retirement. The same rationale that led to the adoption of survivor's benefits triggered by the death of a breadwinner, is reproduced here upon retirement. Both events produce sudden shifts in the financial resources. The

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[211] *Ibid.*, s.195.

[212] S.C. 1979, c.4, s.4.

[213] R.S.C. 1985, c.34 (1st Supp.), s.4.

[214] Spousal allowance recipients who become separated before they reach 65 can continue to receive the allowance for three months as of July 1, 1999. S.C. 1998, c.21, s.114(1), (2).

rationale for extending benefits exclusively to spouses, partners and widows is that many elderly couples live in relationships that followed "traditional" social patterns regarding the division of labour and age of the partners; many couples consist of an older male wage-earner and a younger female homemaker. For such couples, if the older, formerly wage-earning, spouse retires at age 65, the couple may have great difficulty getting by solely on his combined entitlement under the old age pension and GIS. In other words, the spousal allowance was initially designed to respond to the needs of the homemaker who may have devoted much of her life to caring for children and for her spouse, and is entirely dependent on her spouse's income.[215] Widows, too, are presumed to have slim employment prospects in their sixties, because a substantial majority did not participate in the paid labour force during their marriages. A good example of the expression of this objective is the speech of the Hon. Jake Epp, then the Minister of National Health and Welfare, in the House of Commons in 1985 when entitlement to the spousal allowance was fully extended to widows and widowers:

> We cannot and will not allow a very vulnerable segment of Canada's near elderly population to continue to suffer because of circumstances completely beyond their control.... Low income widowed persons aged 60 to 64 do not have many of the options available to most of us. For instance, the vast majority of the persons who will benefit from this Bill are women who have been financial dependants for most, if not all, of their lives. They did not question this financial dependence because society deemed it appropriate. Societal norms dictated that the husband would enter the labour force and earn the money while the wife stayed in the home and performed the unpaid role of mother, housekeeper, companion, nurse, guidance counsellor and community worker, the list is endless.... the Bill before us today recognizes this contribution... the contribution these people have made to our society goes beyond financial measure.[216]

The spousal allowance provisions have been the subject of several *Charter* challenges. In *Egan* v. *Canada*,[217] the Supreme Court of Canada found that the exclusion of a gay couple from

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[215] See the statement of the Hon. Marc Lalonde, Minister of National Health and Welfare, *Proceedings of the Health, Welfare and Social Affairs Committee*, June 12, 1975 at 24:7: "Its objective is clear and singular in purpose. It is to ensure that when a couple is in a situation where one of the spouses has been forced to retire, and that couple has to live on the pension of a single person, that there should be a special provision when the breadwinner has been forced to retire at or after 65, to make sure that particular couple will be able to live upon an income which would be equivalent to both members of the couple being retired or 60 years of age or over".

[216] *House of Commons Debates*, February 4, 1985, at 1941.

[217] [1995] 2 S.C.R. 513.

entitlement to a spousal allowance amounted to discrimination on the basis of sexual orientation in violation of section 15 of the *Charter*. However, a 5-4 majority of the Court upheld the exclusion on the grounds that Parliament should be left to decide whether it has the resources available to extend the benefits to same-sex couples.[218] If Bill C-23 is passed, Parliament will have responded to the *Egan* ruling by granting common law partners, whether same-sex or opposite-sex, the right to receive a monthly allowance if they meet the other eligibility criteria in the legislation. In *Collins* v. *Canada*,[219] the Federal Court Trial Division found that the spousal allowance provisions discriminated on the basis of marital status by denying entitlement to spouses who are single, separated or divorced. However, Rothstein J. found that Parliament is in a better position than the courts to make social policy choices that have significant fiscal consequences.[220] As a result, he concluded that the limitation on equality rights was justifiable pursuant to section 1 of the *Charter*. The effect of his judgment is to place on Parliament the constitutional responsibility of determining whether persons between the ages of 60 and 64 who are single, separated, divorced, or living with others in non-conjugal relationships should be eligible for an old age monthly allowance. We will return to this issue below.

4. Recognizing the Economic Costs and Value of Caregiving Relationships

Because the provision of unpaid domestic services, emotional support and personal care to children and adults is a socially useful role that entails significant financial sacrifice, it is an important government objective to provide economic support to homemakers or unpaid domestic caregivers. As Margrit Eichler has written, "it is in the state's interest to support caregiving for inevitable

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[218] A 5-4 majority of the Court found that the Act violated s.15 of the Charter. However, Sopinka J. broke ranks with the s.15 majority at the s.1 stage of analysis. He upheld the legislation under s.1, arguing (at para. 104) that "government must be accorded some flexibility in extending social benefits and does not have to be pro-active in recognizing new social relationships. It is not realistic for the Court to assume that there are unlimited funds to address the needs of all."

[219] *Collins* v. *Canada*, [2000] 2 F.C.R. 3 (T.D.) [hereinafter *Collins*].

[220] *Ibid.* at paras. 135, 153 and 156.

dependants by any means available."[221] The *Income Tax Act* has taken modest steps in this direction through the dependants' credit and the caregiver credit provisions. As we saw in the previous section, survivors' pensions and the spousal allowance in the *Old Age Security Act* were designed to respond to the needs of women who were dependent on the employment income of their husbands, frequently because they devoted their lives to raising children and caring for other family members.

No federal statute, however, provides direct income support to homemakers and domestic caregivers for the unpaid work they perform. The *Income Tax Act* credits are of no direct assistance to a person without tax liability sufficient to absorb the credit. The caregivers' credit is more likely to flow to the benefit of a co-resident who can claim the credit for care provided by another family member. One of the goals of survivors' benefits and spousal allowances is to compensate women for the sacrifices they make in performing unpaid domestic labour. However, entitlement to these benefits depends on spousal status, a crude proxy for the identification of these needs. Moreover, entitlement to survivors' pensions or spousal allowances is tied to events in the breadwinners' lives (retirement or death), rather than a determination of homemakers' or caregivers' own needs.

It has long been recognized that this gap is a serious injustice that needs to be addressed through the development of new federal social policies. For example, the 1985 Parliamentary Committee on Equality Rights commented that:

> The lack of pension coverage for homemakers, above the basic OAS/GIS level, represents a serious flaw in our pension system. Although society values and depends on the contribution of homemakers, work in the home is not recognized as being of the same value as paid work performed inside or outside the home... We all agree that some mechanism must be found to recognize the vital contribution of homemakers to their families and to society and to ensure that all older Canadians have adequate retirement incomes.[222]

The implementation of a homemaker's pension would accomplish more directly and accurately the objectives that survivors' benefits and the old age monthly allowance have sought to

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[221] M. Eichler, *Family Shifts: Familes, Policies and Gender Equality* (Toronto: Oxford University Press, 1997) at 135.

[222] Report of the Parliamentary Committee on Equality Rights, *Equality for All* (1985) at 44.

accomplish. In the absence of homemakers' pensions, survivors' benefits and old age spousal allowances will continue to play a role in advancing the objective of compensating spouses and partners for the valuable contributions they make in the form of unpaid domestic care and services. These are awkward vehicles, however, for delivering on this important policy objective. They link benefits to the existence of a spousal or partnership relationship with an employee contributor (in the case of survivor's benefits) or pensioner (in the case of the spousal allowance). They do not link benefits specifically to the provision of unpaid domestic care and services.

We have argued that the central value that ought to guide state regulation of adult personal relationships is the promotion of relationships characterized by caring and commitment. There is no doubt that the failure to provide any direct form of income support to unpaid domestic caregivers seriously compromises this value.

5. Compensation for the loss of, or harm to, emotional and economically interdependent relationships

Death or personal injury can have serious consequences for adults in personal relationships with the deceased or injured person. Reasonable expectations of continued financial and emotional support are obviously terminated in the case of death and may be seriously disrupted by personal injury. It is a legitimate state objective to seek to respond to or alleviate these distinct relational harms. It is necessary to do so by employing relational terms in the drafting of the legal rules.

(a) Bereavement Leave

Employment standards laws seek to ensure that employers respect employees' needs for time to grieve, attend funerals, gather with family and friends, commence administration of estates and deal with other financial matters, and rearrange their lives following the death of a loved one. Legislation does so by stipulating minimum bereavement leave entitlements that employers must provide to employees. The relevant provision in the federal context is s.210(3) of the *Canada Labour Code*, which provides that

> Every employee is entitled to and shall be granted, in the event of the death of a member of his immediate family, bereavement leave on any of his normal working days that occur during the three days immediately following the day of the death.

The regulations define "immediate family" as including spouses, common law spouses (which presumably will be changed to "common law partners" following the passage of Bill C-23),[223] parents (including in-laws), children, siblings, and "any relative of the employee who resides permanently in the employee's household or with whom the employee permanently resides."[224]

(b) Relocation of Family

Another federal law that recognizes and seeks to alleviate a distinct financial consequence of death is s.40(1) of the *Judges Act* which provides that if a judge dies while in office, his or her children and surviving spouse or common law partner are in some circumstances entitled to a "removal allowance" if they have to move to another part of the country following the death. The provision recognizes that family members may have to move their residence when a judge is appointed, and, for a variety of personal or economic reasons, may have to move again upon the judge's death.[225]

(c) Wrongful death or injury

Where the death or injury of a person is caused by the wrongful actions of another, Canadian statutes give family members a right to bring a civil action to recover damages for the economic and emotional injuries they have suffered consequent upon the tortiously caused death or injury. While the establishment of statutory tort actions is a matter that normally falls within provincial

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[223] Thus rectifying the omission that was the subject of an unsuccessful human rights complaint alleging discrimination on the basis of "family status" in *Canada (Attorney General)* v. *Mossop*, [1993] 1 S.C.R. 554.

[224] SOR/78-560, s.5; SOR/91-461, s.35.

[225] See also *Government Employees Compensation Act*, R.S.C. 1985, c.G-5 (compensation for the dependants of government employees who die in the course of employment and where compensation is not available under other laws); *Merchant Seaman Compensation Act*, R.S.C. 1985, c.G-5 (payments to family members of merchant seamen who have died); Pensions Act, R.S.C. 1985, c.P-6 (pensions to members of the armed forces and their dependants in cases of injury or death); *War Veterans Allowance Act*, R.S.C. 1985, c.W-3 (survivors' benefits for spouses and common law partners of war veterans).

jurisdiction, the federal government has the power to establish civil actions as an incidental aspect of its jurisdiction over certain activities such as aeronautics, navigation and shipping.

Thus, for example, the *Carriage by Air Act*[226] imposes liability on airlines to each member of a passenger's family who suffered damage because of a passenger's death.[227] Family members are defined to include wives, husbands, common law partners, parents, grandparents, siblings, children and grandchildren.

Similarly, Part XIV of the *Canada Shipping Act*[228] enables "dependants" to bring a wrongful death action when a member of the family is killed through the negligence of another in a boating accident that occurs at sea or on inland waters anywhere in the country. For the purposes of highlighting the reform issues with respect to statutes that seek to respond to the economic and emotional relational consequences of death or injury, it will be illuminating to conduct a more detailed examination of the origins and evolution of this statutory cause of action.

The common law took a very harsh approach to family members' loss of the expectation of continued emotional or economic support upon the death of a loved one: no cause of action was recognized. The severity of the common law rule was overcome in England in 1846 with the enactment of *Lord Campbell's Act.*[229] The Act recognized the legitimate interests of "dependants" in the lives of their close family members. It enabled family members to bring a claim for their pecuniary losses consequent upon the negligently caused death of a family provider. The Act set out a list of family members who were entitled to bring a claim: wives, husbands, parents, grandparents, children and grandchildren. The common law bar to wrongful death actions remained in place for claims brought by persons in relationships with the deceased that did not fall within the statutory list. If a claimant had the requisite relationship with the deceased, the Act permitted recovery of his or

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[226] R.S.C. 1985, c.C-26.

[227] Schedule 2, section 1 (amended by Bill C-23).

[228] R.S.C. 1985, c. S-9.

[229] *An Act for compensating the Families of Persons killed by Accidents*, 1846, 9 & 10 Vict., c.93.

her derivative "pecuniary" losses. It was not possible to claim damages for grief, bereavement, loss of consortium, or for the deceased's suffering prior to death.[230] Rather, the claim is for the loss of a reasonable expectation of a future pecuniary benefit. The claim will include the portion of the deceased's disposable income and the value of the domestic services that would have flowed to the benefit of the claimant in the future.

Wrongful death statutes inspired by *Lord Campbell's Act* have been passed in all common law provinces and similar rights of action are recognized in the Quebec Civil Code. However, in the context of Canadian maritime law, a wrongful death action was not added to the *Canada Shipping Act* until 1948.[231] The scope of the action is closely modelled on *Lord Campbell's Act.* The list of potential claimants is identical to the 1846 statute, with the exception that the definitions of children and parents includes persons in adoptive or social (*in loco parentis*) parent-child relationships. Unlike some of its provincial counterparts, the maritime law wrongful death action has not been modernized since 1948 to reflect contemporary conceptions of relational losses. Section 61 of the Ontario *Family Law Act*,[232] for example, puts in place a relational claim that is not limited to wrongful death actions. It also permits claimants to bring actions in cases of negligently caused personal injury to a family member, broadens the class of claimants to include common law spouses and same-sex partners,[233] and expressly permits recovery of damages for loss of "guidance, care and companionship that the claimant might reasonably have expected to receive from the person if the injury or death had not occurred."[234] In contrast, the federal maritime wrongful death action is still limited to claims resulting from death, common law partners and siblings are not included in the list

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[230] See generally John G. Fleming, *The Law of Torts*, 8th ed. (Sydney, N.S.W.: Law Book Company, 1992) at 665-675.

[231] S.C. 1948, c.35, s.53, adding "Part XVII, Fatal Accidents" (now Part XIV) to the legislative scheme.

[232] R.S.O. 1990, c.F-3, s.61.

[233] *Amendments Because of the Supreme Court of Canada Decision in M. v. H. Act*, 1999, S.O. 1999, c.6, s.25(25).

[234] Section 61(2)(e)

of claimants, and compensation for the loss of future emotional support is not explicitly recognized. In all of these ways, the *Canada Shipping Act* continues to reflect a limited nineteenth century conception of relational harm.

While Parliament has not taken any steps to modernize the scope of the maritime wrongful death claim since 1948, the Supreme Court of Canada took significant steps forward in its 1998 ruling in *Ordon Estate* v. *Grail*.[235] The Court recognized that

> ...contemporary conceptions of loss include the idea that it is truly a harm for a dependant to lose the guidance, care and companionship of a spouse, parent, child, etc... It is unfair to deny compensation to the plaintiff dependants in these actions based solely upon an anachronistic and historically contingent understanding of the harm they may have suffered.[236]

The Court therefore reformed Canadian maritime tort law to permit claims for relational losses arising out of negligently caused personal injury to a family member, and to permit claims for loss of guidance, care and companionship upon the negligently caused death or personal injury of a family member.[237] The Court was not willing, however, to expand the class of claimants entitled to bring a claim to include common law partners[238] and siblings:

> ...although it may be desirable for Parliament to expand the list of eligible dependants under s. 645 of the *Canada Shipping Act*, it would be inappropriate for the courts to undertake this task unilaterally by reforming non-statutory maritime law in order to supplement the statutory provision. Through the *Canada Shipping Act*, Parliament has spoken as to the class of eligible plaintiffs in the case of a fatal accident. For this Court to reform the law to expand the class would be to effect a legislative and not a judicial change in the law.[239]

Parliament has not yet acted to expand the list of eligible claimants. Bill C-23 contains no amendment to the *Canada Shipping Act*. However, it is clear that this omission is not the result of a judgement that the *status quo* is acceptable. Rather, the federal government "has undertaken to

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[235] [1998] 3 S.C.R. 437 [hereinafter *Ordon Estate*].

[236] *Ibid.* at 508 paras.101-2 per Iacobucci and Major JJ. for the Court.

[237] *Ibid.* at 527 para.140.

[238] The Ontario Court of Appeal in *Ordon Estate* held that the prohibition on marital status discrimination in section 15 of the *Charter* required the words "husband" and "wife" to be interpreted as including common law spouses: (1996) 30 O.R. (3d) 643 at 674.

[239] *Ordon Estate*, supra note 235 at para.106.

complete a top-to-bottom modernization" of the Act[240] and the forthcoming amendments will no doubt address the issue of eligible claimants in the maritime wrongful death action. We will return to this issue in Part II (B), below.

6. Preventing violence or abuse in adult personal relationships

Intimate relationships give rise to unique risks and vulnerabilities. These risks and vulnerabilities may be compounded by isolation from others and emotional or economic dependence. Just as caring and committed relationships are worthy of state support and recognition, the state ought to be vigilant to discourage and condemn relationships that are violent or abusive. These concerns have led the state away from regulating relationships by reference to their formal status and towards regulation premised on actual relational qualities. The repeal of the marital rape exemption in 1983 is a clear example of this fundamental shift in norms guiding state regulation of adult personal relationships.[241]

A number of provisions of the *Criminal Code* aim to prevent and punish physical violence or harassment in adult personal relationships. Criminal prohibitions on assault and sexual assault apply with equal force to persons who are married or in other adult relationships. To be valid, consent to sexual activity cannot be obtained "by abusing a position of trust, power or authority." (s.273.1(2)(c)) The "rape shield" provision of the *Criminal Code* aims to prevent the use of evidence of complainants' past sexual relationship with an accused or anyone else from being used to suggest that they abandoned their right to physical security. (s.276(2)) The criminal harassment provision of the Code, s.264, was enacted in large part to discourage "stalking" and other behaviour threatening the physical and psychological security of persons seeking to avoid or end intimate personal relationships. The incest prohibition in s.155 of the Code reflects the view that sexual intercourse

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[240] See the Transport Canada information on-line at <http://www.tc.gc.ca/canadashippingact/english/intro_e.htm>.

[241] Prior to 1983, rape was defined in s.143 of the Code as a male person having non-consensual "sexual intercourse with a female person who is not his wife". Now, rape has been replaced with the crimes of sexual assault in sections 271-3 of the Code. Section 278 provides that a husband or wife may be charged with sexually assaulting his or her spouse.

with a parent, grandparent, child, grandchild or sibling is likely to be either abusive or psychologically damaging. The offences of sexual interference, invitation to sexual touching and sexual exploitation in sections 151-153 and section 153.1 of the Code seek to protect persons who are vulnerable to sexual abuse as a result of youth or disability. These provisions of the Code reflect particular concern regarding the potential abuse by adults of relationships of authority or dependence. One provision that stands out as anomalous is the prohibition on anal intercourse in section 159 of the Code. This provision makes it an offence to engage in anal intercourse unless the act takes place in private between two persons who are married to each other or both over the age of 18.

A concern with addressing the consequences of violence or abuse in adult personal relationships is evident in the sentencing provisions of the Code. Evidence that an offender abused his spouse or child, or abused a position of trust or authority in relation to a victim, is an aggravating factor in sentencing (s.718.2(a)(ii) and (iii)). Moreover, an offender who has caused or threatened harm to a member of his household can be required to make restitution to them for any costs they have incurred as a result of moving out of the offender's household for temporary housing, food, child care and transportation (s.738(1)(c)).

In addition to its concern with preventing and punishing physical violence, the *Criminal Code* targets serious forms of abusive neglect that threaten the lives or health of persons in dependency relationships. Section 215(1) imposes legal duties on parents and guardians to provide the necessaries of life to children, on spouses and partners to provide the necessaries of life to each other, and on caregivers or custodians to provide the necessaries of life to persons under their charge who are wholly dependent on them 'by reason of detention, age, illness, mental disorder or other cause.' Necessaries of life is understood by the courts to include food, clothing, shelter and medical treatment. By virtue of section 215(2), it is an offence to fail to provide necessaries to a child, spouse or common law partner who is 'in destitute or necessitous circumstances'. It is also an offence to fail to provide necessaries and thereby endanger the life or health of a child, spouse, common law partner, or wholly dependent person under one's charge.

In Canada's original 1892 *Criminal Code*, it was an offence for husbands to not provide necessaries to their wives.[242] The offence reflected the view that marriage imposed a permanent obligation on husbands to support their wives, even in the case of separation.[243] In 1974, the marital offence was amended to impose a spousal duty to provide necessaries on wives as well as husbands.[244] In 2000, Bill C-23 will extend the duty to provide necessaries to common law partners of the opposite or same-sex.[245] The spousal offence thus originated in a patriarchal model of the family and has since been changed to accommodate the demands of gender neutrality and non-discrimination on the basis of marital status and sexual orientation. These expansions in the offence have occurred without any alteration of the substantive definition of the crime. We will take up the argument below that s.215 is in need of further reform to eliminate its reliance on outdated assumptions regarding dependency relationships.

As the above review illustrates, the state's legitimate concern with preventing violence or abuse related to adult personal relationships most often manifests itself in federal legislation in the form of criminal offences directed at punishing violence or abuse. Criminal prohibitions operate retroactively to punish behaviour that has already occurred and provide some deterrence of prospective acts of violence. The federal government, however, could do much more to protect persons from the risks of violence in their personal relationships. The *Witness Protection Program Act*[246] provides a useful model for a more pro-active approach to the prevention of violence. The Act

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[242] S.C. 1892, c.29, s.210. In 1913, a presumption was added that "evidence that a man has cohabited with a woman or has in any way recognized her as being his wife shall be *prima facie* evidence they are lawfully married." S.C. 1913, c.13, s.14. This presumption could be rebutted by proof that the couple was not married. The point was not to extend the duty to common law husbands, but to relieve the state of the burden of proving the existence of a lawful marriage. This presumption, now in s.215(4)(a) of the Code, will be repealed by Bill C-23.

[243] See, e.g., *R. v. Wilson*, (1933) 60 C.C.C. 309 (Alta. S.C. App. Div.) (husband convicted for non-support of separated wife); *R. v. Harenslak*, [1937] 1 D.L.R. 337 (Alta. S.C. App. Div.) (husband convicted for non-support of separated wife); *Whitelaw et al. v. Wilson et al.*, [1934] O.R. 415 (H.Ct.) (offence for husband to fail to prevent wife's suicide). In *R. v. Middleton*, [1997] O.J. No. 2758, at para.10, Justice LaForme states that "[h]istorically these provisions of the Criminal Code were intended by Parliament to address the situation of a man deserting his wife and children where the effect of the desertion would endanger their lives or health."

[244] *Statute Law (Status of Women) Amendment Act*, S.C. 1974-75-76, c.66, s.8.

[245] Bill C-23, s.93.

[246] S.C. 1996, c.15.

enables the Commissioner of the R.C.M.P. to provide new identities and police protection to persons admitted to the program. At the moment, the program is limited to witnesses who have assisted in the prosecution of criminal offences and to persons who, because of their "relationship" or "association" with a witness, require protection.[247] These limitations reflect the restricted purpose of the program: "to promote law enforcement by facilitating the protection of persons who are involved directly or indirectly in providing assistance in law enforcement matters."[248] The Act reflects the view that "witnesses are the ultimate public servants"[249] and need to be protected from violence or threats of violence to which they are exposed by their participation in the criminal process as Crown witnesses. At the moment, protection can be afforded to persons at risk of relational violence only if they have testified against their ex-spouses or ex-partners (or are associated with someone who has).

The goals of the Witness Protection Program are laudable. Yet the restriction of the program to witnesses and their associates raises the concern that the government is willing to act to prevent violence in personal relationships only when it furthers its interest in punishing criminal acts that have already occurred. The state ought to be concerned with protecting all persons from risks of violence. Canadians who are not witnesses ought to be entitled to seek pro-active protection from serious ongoing abuse, intimidation or threats they face from ex-spouses, ex-partners, or other persistent stalkers. The federal government should give serious consideration to expanding the *Witness Protection Program Act*, as proposed in a 1999 private member's bill,[250] or by expanding its new identities program, which has provided limited assistance to victims of domestic abuse.[251]

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[247] *Ibid.*, s.2 (definition of "witness").

[248] *Ibid.*, s.3.

[249] *House of Commons Debates* (5 October 1995) at 15263.

[250] Bill C-233, *An Act to amend the Witness Protection Program Act*, introduced by Reform M.P. Jay Hill. The Bill would rename the *Act the Witness and Spousal Protection Program Act* (s.2) and would add to its purposes the protection of spouses (including common law partners) "who believe on reasonable grounds that their life is in danger by reason of acts committed against them by their spouse." (s.4)

[251] Janice Tibbets, "Ottawa considers extending witness protection to abuse victims" *National Post* (1 March 2000) A10.

7. Restructuring financial relationships on the break down of adult personal relationships

Another important objective of federal legislation has been to assist in the restructuring of financial relationships on marriage break down. Federal legislation has imposed spousal and child support obligations on divorce, provided for the division of benefits under the *Canada Pension Plan*, as well as established a range of mechanisms for the enforcement of support orders. These provisions are intended to recognize the consequences of financial interdependency on marriage break down, by imposing and enforcing support obligations between family members.

(a) Family Support Obligations - *Divorce Act, 1985*

The *Divorce Act*, 1985 imposes both spousal support and child support obligations on marital break down. Section 15.1 deals with child support obligations. Following the 1997 amendments, these child support obligations are governed by the child support guidelines. The objectives of the guidelines are: (a) to establish a fair standard of support for children that ensures that they benefit from the financial means of their parents (b) to reduce conflict and tension between parents or spouses by making the calculation of child support more objective; (c) to improve the efficiency of the legal process by giving courts and parents and spouses guidance in setting the levels of child support and encouraging settlement, and (d) to ensure consistent treatment of parents or spouses and their children who are in similar circumstances. [252] While child support is a right of the child, and is thereby more specifically part of the regulation of the parent/child relationship, the child support guidelines are nevertheless an important dimension of the restructuring of adult relationships upon marriage break down. The guidelines are intended to give guidance to this restructuring, and thereby allow parents to reach agreements with less conflict or litigation.

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[252] SOR/97-175 as am. by SOR/97-563.

Section 15.2 of the *Divorce Act 1985* deals with spousal support. Section 15.2(1) authorizes courts to make spousal support orders on divorce. The objectives of spousal support orders are set out in section 15.2(6), as (a) recognizing any economic advantages or disadvantages to the spouses arising from the marriage or its break down; (b) apportioning between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage; (c) relieving any economic hardship of the spouses arising from the break down of the marriage; and (d) in so far as practicable, promoting the economic self-sufficiency of each spouse within a reasonable period of time.

The family support obligations of the *Divorce Act* fit within the general objectives of family law, setting out the private rights and responsibilities of individual family members, providing that family members have obligations to support one another, and those obligations do not cease upon break down of the family. The support provisions of the *Divorce Act* recognize that marriage is an economic partnership that may confer economic advantages and disadvantages on the spouses, advantages and disadvantages that need to be addressed when that relationship breaks down.

(b) Enforcement of Family Support Obligations

The *Garnishment, Attachment and Pension Diversion Act*[253] provides generally for garnishment and attachment of federal salaries. It further provides for the diversion of pension benefits from federal sources to satisfy financial support orders, including any support order made under the *Divorce Act*, or any provincial law relating to family support obligations. The person named as recipient of a financial support order can apply for a diversion of a pension benefit payable to the recipient. The Act allows for up to 50 percent of the benefit to be diverted, or if the support order is in arrears, more than 50 percent of the benefit may be diverted.

There are a number of federal superannuation statutes which include provisions for the garnishment of pensions or annuities to satisfy support orders. The *Canadian Forces*

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[253] R.S.C. 1985, c.G-2.

Superannuation Act,[254] the *Diplomatic Service (Special) Superannuation Act*,[255] the *Lieutenant Governors Superannuation Act*,[256] the *Public Service Superannuation Act*,[257] and the *Royal Canadian Mounted Police Superannuation Act*[258] all include provisions that allow a pension, annuity or amounts otherwise payable under the Acts to be diverted to satisfy financial support orders, in accordance with Part II of the *Garnishment, Attachment and Pension Diversion Act*.[259] The *Judges Act* and the *Governor General's Act* have virtually identical provisions.[260]

The *Family Orders and Agreements Enforcement Assistance Act*[261] provides for (1) the release of information regarding location of a person in breach of a family provision (including a support, custody or access order);[262] (2) the garnishment of federal moneys to satisfy support orders and support provisions; and (3) the denial of federal licenses, including a passport.[263]

(c) Division of Pensions on Relationship Break down

Division of property on relationship break down falls within provincial jurisdiction. However, federal legislation provides for the division of federal pensions, otherwise in accordance with provincial rules.

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[254] R.S.C. 1985, c.C-17.

[255] R.S.C. 1985, c.D-2.

[256] R.S.C. 1985, c.L-8.

[257] R.S.C. 1985, c.P-36.

[258] R.S.C. 1985, c.R-11.

[259] For example, section 36(1) of the *Canadian Forces Superannuation Act* provides "When any court in Canada of competent jurisdiction has made an order requiring a recipient to pay financial support, amounts payable to the recipient under this Part or Part III are subject to being diverted to the person named in the order in accordance with Part II of the Garnishment, Attachment and Pension Diversion Act."

[260] See section 52(1) of the *Judges Act*, R.S.C. 1985, c. J-1 and s.11 of the *Governor's General Act*, R.S.C. 1985, c.G-9.

[261] R.S.C. 1985, c.4 (2nd Supp.).

[262] This part provides for the release of information where a person is in breach of a family provision and for reasonable steps to be taken to locate the person. Information from information banks, including those controlled by Department of Human Resources Development, the Department of National Revenue and the Canada Employment Insurance Commission may be released. The information that can be released includes the address of the person in arrears, as well as the name and address of the employer of the person in arrears.

[263] Section 64 provides that the purpose of the license denial is "to help provincial enforcement services enforce support orders and support provisions by providing for the denial of certain licences to debtors who are in persistent arrears." Other licenses that can be denied include a range of pilot licenses under the *Aeronautics Act*, R.S.C. 1985, c A-2 and a range of occupational licenses under the *Canada Shipping Act*.

The *Canada Pension Plan Act* allows for a division of unadjustable pension earnings between spouses and common law partners on relationship break down. On divorce or separation, section 55 of the Act allows each of the former spouses or common law partners to make an application for the equal division of pension entitlements that each spouse/partner accumulated during the relationship. Prior to Bill C-23, under section 55, "spouse" was defined as a married spouse. [264] Spouses or former spouses had to have cohabited for at least 36 consecutive months. Former spouses could apply for a division for unadjustable pensions earnings accrued in the months in which the former spouses cohabited during the marriage. Bill C-23 will amend the definition of spouse in section 2(1) of the *Canada Pension Plan Act,* adding "common law partner", defined as a "person who is cohabiting with the contributor in a conjugal relationship at the relevant time, having so cohabited with the contributor for a continuous period of at least one year." Section 55.1 will also be amended to allow for the division of unadjusted pension earnings in the case of common law partners. Section 55.1(3) now provides "that persons subject to a division of unadjusted pensionable earnings must have cohabited for a continuous period of at least one year in order for the division to take place". [265]

As Carol Rogerson notes "this provision reflects the same economic model of the spousal relationship as do schemes which provide for division of matrimonial property after marriage break down – i.e., the view of marriage as an economic partnership in which spouses contribute equally to

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[264] See s.55(10)(1), *Canada Pension Plan.* [Pre-amendment] section 2 of the CPP defines spouse as a person of the opposite sex with whom the contributor has a conjugal relationship and has cohabited for one year. However, this definition of spouse in section 2 expressly excludes section 55. Under section 55, spouse is defined as married spouse.

[265] In the case of spouses, section 55.1(1)(a) and (b) provide that a division of pensionable earnings shall take place on divorce, nullity, living separate and apart for one year, or death if the parties have been living separate and apart for one year, and the application is made within three years of the death. In the case of common law partners, section 55.1(1)(c) provides that a division of pensionable earnings shall take place if the former common law partners have been living separate and part for one year, or one of the former partners has died during that period. The application by former common law partners must be made within four years after the day on which the former common-law partners commenced to live separate and apart.

the accumulation of wealth during the course of the relationship, entitling them to equal shares of the wealth upon break down."[266]

The *Pension Benefits Division Act* also provides for the division of pensions earnings of the members of federal pension plans for public employees. Prior to the Bill C-23, a member, spouse or former spouse may apply to divide the member's pension benefits.[267] Section 2 of the Act defined spouse as "a person of the opposite sex who (a) is married to the member, (b) is cohabiting with the member in a conjugal relationship, having so cohabited with the member for a period of not less than a year, or (c) is a party to avoid marriage with the member." Bill C-23 will amend the definition, replacing opposite-sex common law spouses with "common law partner." Any application may be made (1) where a court, in a proceeding involving divorce, annulment or separation, orders the pension benefits to be divided between the member and the spouse/former spouse, or common law partner or (2) where the spouses or common law partners have lived separately and apart for one year, and a court orders that the pension benefits be divided, or the member and spouse/former spouse or common law partner made a written agreement providing for the division of pension benefits. [268] A division of pension benefits is made by transferring 50% of the value of the pension benefits that accrued during the period subject to division to the spouse or former spouse.[269] The *Pension Benefits Standards Act*[270] governs private pension plans in federally-regulated workplaces. Section 25 provides for the assignment of pension benefits to a spouse, former spouse or common law partner.[271]

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[266] Carol Rogerson, *supra* note 169 at 324-5.

[267] Section 4, *Pension Benefits Division Act.*

[268] Section 4(2), *Pension Benefits Division Act.*

[269] Section 8(1), *Pension Benefits Division Act*, if the plan is a retirement compensation arrangement. Otherwise, it is transferred to a registered pension plan selected by the spouse/former spouse, a prescribed retirement savings plan or fund, or to the purchase of a prescribed immediate or deferred life annuity for the spouse/former spouse.

[270] R.S.C. 1985, c.32 (2nd Supp.).

[271] Section 25(1) , *Pension Benefits Standards Act.* Prior to Bill C-23, section 2 of the Act defined spouse to include persons of the opposite sex who have cohabited in a conjugal relationship for not less than one year. Under section 25, spouse was given the same meaning that it is given under the applicable provincial property law, or in relation to an assignment or agreement between the parties, includes persons who have cohabited in a conjugal relationship for

These various federal statutes providing for the division of pension benefits are all based on the same principle as the provincial family laws dealing with division of property, namely, that marriage is a kind of economic partnership, that gives rise to an entitlement to equal sharing on marital break down. As Rogerson notes "these provisions governing pension division can essentially be seen as an adjunct to private law rights with respect to division of matrimonial property between spouses upon marriage break down".[272]

8. Conclusion

In this section, we have provided, for descriptive purposes, an overview of federal laws that employ relational terms. We have sought to categorize those laws according to the legitimate federal objectives that they seek to accomplish. It is important to emphasize that to conclude that these are legitimate objectives in the regulation of adult relationships is not to suggest that the objectives are well served by existing spousal or relational definitions. Nor is it to conclude that all of the statutes included in our review ought to be seen as having legitimate relational objectives. In the sections that follow, we further interrogate both of these issues.

III. Legitimacy of Relational Objectives in Particular Policy Contexts

In this section, we pursue a critical evaluation of some of the laws reviewed above to determine whether their pursuit of relational objectives continues to be compelling. While we have

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at least one year. Bill C-23 will amend the statute, allowing for the assignment of pensions benefits to a former-common law partner.

[272] Rogerson, *supra* note 169 at 328.

concluded in the previous section that these laws are pursuing objectives that, in the abstract, are legitimate relational objectives, it may be that the continued pursuit of these objectives in a particular legislative context is no longer legitimate. In other words, there are instances where the use of relational criteria is an entirely inappropriate way of imposing penalties or distributing state benefits, rights and/or responsibilities. This could be the case for a number of reasons. First, the relational objective may lack any factual or empirical foundation. We argue that this is the case with the anal intercourse offence in the *Criminal Code*. Second, the asserted relational objective may not correspond to the actual objectives of a legislative scheme. The actual design or operation of a legislative scheme may call into question the legitimacy of an asserted relational objective. This is the case, we argue below, with respect to the insurable employment provisions of the *Employment Insurance Act* and the monthly allowance provisions of the *Old Age Security Act*. Third, even if the law is contributing to the accomplishment of relational objectives, there may be other more compelling state objectives that override the pursuit of the relational objectives in the particular policy context. We argue that this is the case with the evidentiary rules that make a husband or wife incompetent and non-compellable as witnesses for the Crown in a criminal trial of his or her accused spouse.

A. The Anal Intercourse Offence in Section 159 of the *Criminal Code*

The anal intercourse provision of the *Criminal Code* uses adult relational terms in a manner that stands out as anomalous in the current normative structure of sexual offences. Unlike other particular kinds of sexual acts, section 159 makes the act of engaging in anal intercourse an offence regardless of whether violence, exploitation or a commercial exchange was involved. An exception to the prohibition was added in 1969 to remove from the scope of the offence acts of anal intercourse engaged in, in private, by husband and wife, or any two persons over the age of twenty-

one.[273] In 1987, the age of consent to anal intercourse was reduced to eighteen[274] (still four years higher than the age of consent that operates with respect to other kinds of consensual, non-commercial sexual activity). The continuing presence of distinct treatment of acts of anal intercourse in the sexual offence provisions of the *Criminal Code* can be justified only if acts of anal intercourse involve distinct harms or risks of harm to the participants. The marital exemption, in turn, must be explained by the proposition that protecting marital privacy and autonomy is of greater concern than the alleged harms of anal intercourse.

Since its enactment in 1969, Parliament has not amended the marital exemption to extend it to acts committed by partners to other kinds of committed relationships. Bill C-23 will not amend section 159.[275] As a result, unmarried persons under the age of 18 can be charged with committing the offence, even if the charge relates to private, non-exploitative sexual acts with a common law partner. However, the Ontario and Quebec Courts of Appeal have declared the anal intercourse provision to be of no force and effect on the grounds that it discriminates on the basis of age and sexual orientation, and that it fails to further any compelling state objective.[276] The provision remains in force in the other provinces. Rather than expand the marital exemption in section 159(2) of the Code, Parliament ought to repeal s.159 entirely. The distinct criminal prohibition on anal intercourse does not contribute to the accomplishment of any legitimate policy objectives.

B. Defining Insurable Employment in the *Employment Insurance Act*

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[273] *Criminal Law Amendment Act*, 1968-69, S.C. 1968-69, c.38, s.7.

[274] R.S.C, 1985, c. 19 (3rd Supp.), s. 3.

[275] Nor will Bill C-23 amend provisions of the *Young Offenders Act*, R.S.C. 1985, c.Y-1, that seek to take account of the importance of maintaining contact between married young offenders and their spouses. These gaps in Bill C-23's otherwise comprehensive coverage suggest that while the government is willing to address the situation of adults' living in sexual relationships outside of marriage, it is still having trouble coming to grips with teenagers' sexual relationships if they are not sanctified by marriage.

[276] *R. v. Carmen M.*, (1995) 98 C.C.C. (3d) 481 (Ont. C.A.); *R. v. Roy*, (1998) 125 C.C.C. (3d) 442 (Que. C.A.). Madam Justice Reed of the Federal Court Trial Division reached the same result in *Halm v. Canada (Minister of Employment and Immigration)*, [1995] 2 F.C. 331 (T.D.).

The *Employment Insurance Act* excludes non-arm's length employment from the definition of insurable employment. Without sufficient insurable employment, an employee who has lost his or her job does not qualify for unemployment benefits. These provisions pursue a legitimate federal objective: the denial of benefits to persons who have in essence committed fraud by manufacturing fictitious employment relationships for the purpose of claiming benefits. The question is whether relational terms ought to be used to protect the scheme from being abused by collusive employers and employees.

The legislation currently uses relational definitions to accomplish this objective. If persons are unrelated, "it is a question of fact whether [they] were at a particular time dealing with each other at arm's length." If persons are related by blood, marriage, common law partnership or adoption, they are deemed not to deal with each other at arm's length.[277] Until 1990, the presumption of non-arm's length dealing between related persons was irrebuttable: family employment was not insurable under the Act. Relational status was unjustly used as a proxy for fictitious employment. Meanwhile, whether employment by non-family members was real and therefore insurable was a question of fact to be determined in each case.

Now, even if persons are related, and therefore initially deemed to not deal with each other at arm's length, s.5(3)(b) of *the Employment Insurance Act* allows the Minister to deem the reverse:

> ...if the employer is, within the meaning of [the *Income Tax Act*], related to the employee, they are deemed to deal with each other at arm's length if the Minister of National Revenue is satisfied that, having regard to all the circumstances of the employment, including the remuneration paid, the terms and conditions, the duration and the nature and importance of the work performed, it is reasonable to conclude that they would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length.

The 1990 amendment thus abandons the view that family employment is always manufactured with an eye to taking advantage of unemployment benefits. Whether family employment qualifies as insurable employment depends on an examination of the relevant facts

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[277] Section 5(2)(i) and 5(3)(a)of the *Employment Insurance Act*, incorporating the definition of arm's length dealing in s.251(1) of the *Income Tax Act*.

("having regard to all the circumstances of the employment"). In other words, after the 1990 amendment, the tests for determining whether employment between related persons or between unrelated persons is insurable are the same: in both cases, it is the factual elements of the employment relationship itself that determines whether it is fictitious or real. This is as it should be.

According to the legislation as currently structured, however, decision-makers must follow an unnecessarily confusing and circuitous path. The use of the notion of an "arm's length" relationship as a proxy for fraudulent arrangements is confusing. Commercial relationships between persons with common interests – such as friends, associates or family members – are not necessarily tainted by collusive fraud. Similarly, persons without any prior association may both have something to gain from concocting a fictitious employment relationship. A more direct way of pursuing the objective of this provision would be to replace the exclusion of non-arm's length employment currently effected by sections 5(2)(i) and 5(3), and to replace those sections with a provision excluding employment if, having regard to all the circumstances, it is reasonable to conclude that the contract of employment was manufactured to take advantage of unemployment benefits.

The removal of the arm's length and relational definitions from section 5 of the Act would have advantages beyond the production of a more transparent and less confusing legislative regime. At the moment, since persons related by blood, marriage, partnership or adoption are deemed not to deal with each other at arm's length (at least initially), the existence of such a relationship becomes a subject of inquiry and contestation in the administration of the scheme.

For many years, the administration of the provision excluding non-arm's length employment from insurable employment has given rise to a steady stream of appeals to the Tax Court by claimants denied unemployment benefits.[278] A significant number of these cases involved examinations into the private relational aspects of claimants' lives to determine, for example,

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[278] Dozens of such appeals have appeared each year in the QuickLaw database over the past decade. Since January 1999, we found over 70 appeals by claimants denied unemployment benefits after the termination of their employment by a relative. The vast majority of these appeals fail, in large part because the onus is on the claimant to

whether opposite-sex cohabitants were in a conjugal relationship.[279] In some of the reported cases claimants have denied the existence of a conjugal relationship with their employers, while the Minister has sought to establish such a relationship to help justify the decision to deny benefits. This is an undignified spectacle that ought to be avoided if at all possible.

The Minister and the courts appear to have imposed a heightened degree of suspicion and scrutiny on family employment relationships. In our view, this focus on the personal aspect of a family employment relationship entails an unnecessary invasion of privacy. It also distracts attention from what the real issue ought to be regardless of whether a personal relationship existed: was the employment relationship manufactured for fraudulent purposes or not?

Moreover, as a general principle, the government should not make an individual's entitlement to basic financial benefits dependent upon the non-existence of a personal relationship *per se*. Persons should not be put in the position of having to choose between the formation of personal relationships and receiving benefits to meet their basic financial needs. The *Employment Insurance Act* as currently structured and administered places an incentive on persons in family relationships to avoid working for each other. This negative consequence can be avoided and privacy respected without compromising the policy objectives of the statute. In our view, the relational and arm's length concepts in section 5 of the Act should be replaced by a provision excluding employment if, having regard to all the circumstances, it is reasonable to conclude that the contract of employment was manufactured to take advantage of unemployment benefits.

C. The Monthly Allowance in the Old Age Security Act

establish that the Minister exercised his or her discretion in an arbitary or capricious manner. There are relatively few reported cases finding employment between unrelated persons to be uninsurable.

[279] For examples of cases where the female claimant's denial of a common law relationship with her employer was rejected after the court examined the details of the personal relationship, see *Sparkes v. Canada (Minister of National Revenue)*, [1999] T.C.J. No. 660 at para.39; *Boisvert v. Canada (Minister of National Revenue)*, [1999] T.C.J. No. 222 at paras.20-2; *Kitchen v. Canada (Minister of National Revenue)*, [1998] T.C.J. No. 169; *Sampson v. Canada (Minister of National Revenue)*, [1997] T.C.J. No. 1061; *Falardeau v. Canada*, [1997] T.C.J. No. 203. See also *Hollett v. Canada (Minister of National Revenue)*, [1998] T.C.J. No. 724 (considering whether separation of claimant from her husband employer meant they were at arm's length).

As described above, the stated purpose of the monthly allowance provisions has been to respond to the distinct needs and contributions made by women who have performed unwaged labour in the home. However, the legislative scheme has never been limited to claims by homemaker women. Rather, it is a gender-neutral scheme that relies on a combination of factors - age, spousal/partner or widowed status, and combined income - to determine entitlement. Adult relationships qualify for entitlement regardless of the presence or absence of children, and regardless of whether the relationship involved economic dependency. Indeed, common law partners qualify for the benefit even if they have lived together for only one year.

Given these features, it is obvious that the legislative design is poorly tailored to the stated relational objective. The goal of the scheme as drafted is, rather, to respond to the economic needs of the elderly or near elderly poor, male or female, so long as they are widowed or living in a spousal or partnership relationship. Because the financial needs the legislation addresses are not distinct to spouses, partners or widows, the Act is a serious affront to the dignity of single, separated or divorced persons whose economic needs may be equivalent or more pressing. Indeed, statistics show that it is elderly women living alone who, not surprisingly, have the highest rate of poverty in Canada. As the Federal Court concluded in the *Collins* case,[280] the monthly allowance provisions of the *Old Age Security Act* discriminate on the basis of marital status in violation of section 15 of the *Charter*.

The same conclusion was reached by the Parliamentary Committee on Equality Rights in 1985. They recommended that "the Spousal Allowances under the *Old Age Security Act* be replaced with an equivalent benefit that is available without reference to marital status."[281] The government acknowledged in its response that "there are other near-elderly persons in need who still do not have the financial protection offered by the Spouses Allowance [sic]." However, the government

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[280] *Collins* v. *Canada*, [2000] 2 F.C.R. 3 (T.D.).

refused to change the law, citing fiscal limitations: "as was recognized by the all-party Task Force on Pension Reform in 1983, restraint prevents the Government from going further at this time."[282] Thus, fiscal constraints have been cited by both the courts[283] and the government for maintaining discrimination contrary to the *Charter of Rights and Freedoms* for more than twenty years.

Yet, with all due respect, the fiscal argument fails to provide a compelling justification for the maintenance of discriminatory benefit programmes. Parliament has a constitutional obligation, when faced with limited resources, to avoid limiting the distribution of resources to claimants identified by a prohibited ground of discrimination. Parliament has a range of choices available to it that are consistent with its constitutional obligations, including making a lower level of benefit available to a larger group of people. Thus, equality norms dictate that the denial of monthly allowances to single, divorced or separated claimants be repealed.

One option would be to remove any relational preconditions to entitlement in the *Old Age Security Act*. Entitlement to a monthly allowance could be determined solely by reference to need. For example, it could remove the relational requirements and make a reduced benefit available to all persons over the age of sixty whose income falls below a certain level. Entitlement to a monthly allowance would then be determined solely by reference to income. Such a scheme would be an improvement on the current legislation in two ways. First, income is a far better proxy than relational status for identifying financial need. Second, an income test avoids state inquiries into private matters that can accompany a relational test of entitlement. Moreover, because individuals are already required to disclose their annual income to the federal government for income tax purposes, an income test can be applied without additional invasions of privacy and with relatively modest administrative cost.

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[281] Report of the Parliamentary Committee on Equality Rights, *Equality for All* (Ottawa: Queen's Printer, 1985) at 45.

[282] *Toward Equality: The Response to the Report of the Parliamentary Committee on Equality Rights* (Ottawa: Department of Justice, 1986) at 22.

[283] *Egan*, *supra* note 32; Collins, *supra* note 280.

A second option would be to replace the monthly allowance available to spouses and common law partners with a monthly allowance targeted more directly to homemakers and caregivers who sacrificed employment earnings in order to provide caregiving and domestic services to other members of their households. While the design and administration of any such scheme would pose practical challenges, in theory it is preferable to the current use of spousal or partnership status to accomplish these goals.

D. Spousal Competence and Compellability in Criminal Trials

Section 4 of the *Canada Evidence Act* is in need of reform. The government is currently considering a package of amendments to the Act, and, in deference to those deliberations, Bill C-23 does not propose any amendments to the *Canada Evidence Act*.

The first law reform issue is whether the policies underlying these special evidentiary rules regarding spousal competence and compellability are still valid and still outweigh the competing policy that favours the admission of all relevant and probative evidence that can aid in the fact-finding process. If not, then legislation ought to be passed amending section 4 and completely abolishing the common law rules restricting the competence or compellability of husbands and wives. If there are valid policies underlying the evidentiary rules, then there are strong arguments for expanding the application of the special spousal evidentiary rules so that they apply to other adult personal relationships whose integrity or harmony is worth preserving. The question would then become how to define the adult personal relationships that ought to be included. The general approach taken to other statutes by Parliament in Bill C-23 suggests that, at the very least, "common law partners" should be incompetent or non-compellable witnesses in the same circumstances as married spouses (and that they should be able to claim a privilege for their private communications). There may even be other non-conjugal adult personal relationships -- for example, relationships between siblings or non-conjugal cohabitants -- whose emotional strength and integrity is worth

preserving to the same degree as marital relationships. If so, they too should be incompetent and non-compellable witnesses (and their communications privileged) in the same circumstances as spouses or common law partners. We will return to these definitional issues below.

A number of policies have been offered over the years for the spousal evidentiary rules. Wigmore traces marital testamentary privileges back to the end of the 1500s and early 1600s. He notes that a variety of explanations for the rule were given in texts beginning in the seventeenth century, including the marital unity of husbands and wives and the assumption that their interests are identical.[284] Neither of these early rationales for the rule is consistent with contemporary attitudes to the marital relationship.[285] The two surviving rationales, according to recent decisions of the Supreme Court of Canada,[286] are, first, that the rules are necessary to foster the integrity and harmony of marital relationships, and second, that they reflect "the natural repugnance in every fair-minded person to compelling a wife or husband to be the means of the other's condemnation, and to compelling the culprit to the humiliation of being condemned by the words of his intimate life partner."[287] The "natural repugnance" rationale, however, is not self-explanatory. What is the basis of the "natural repugnance"? In our view, it has its source in either the unity or common interests of spouses, or the protection of their relational integrity, intimacy and privacy. Since the unity and common interests rationales are based on now discredited conceptions of marital relations, we are left with the marital harmony rationale. However, even this rationale fails to provide a compelling justification of the current rules which have come under sustained attack from courts and commentators.

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[284] J.H. Wigmore, *Evidence in Trials at Common Law*, ed. by John T. McNaughton (Boston: Little, Brown, 1961) Rev. 1961) vol. 8 at 213-22.

[285] "Both of these thoroughly discredited rationales are, of course, based on archaic notions of a woman's role in society and within marriage." Per L'Heureux-Dubé J. in *R.* v. *Hawkins* [1996] 3 S.C.R. 1043 at para. 120 [hereinafter *Hawkins*].

[286] *Hawkins, ibid.*; *R.* v. *Salituro* [1991] 3 S.C.R. 654 [hereinafter *Salituro*]

[287] Wigmore, *supra* note 284 at 217.

Consider first the rule that makes a spouse an incompetent witness for the prosecution in cases that do not fall within the common law exceptions or do not involve offences listed in sections 4(2) or 4(4) of the *Canada Evidence Act*. The spousal incompetence rule has the effect of preventing a spouse from testifying even if he or she would prefer to do so. In other words, the legislation substitutes a paternalistic preference for preserving marital harmony even if it conflicts with a spouse's own view o.. whether his or her relational interests are best served by testifying or not. In our view, there are two fundamental objections to this position. One is that if a spouse chooses to testify against his or her husband, there may be little marital harmony left to protect. And, second, even if the integrity of the relationship is an ongoing concern, the witness spouse is in the best position to determine whether it is worth taking the relational risks that testifying entails. As Iacobucci J. stated in *R.* v. *Salituro*,[288]

> The grounds which have been used in support of the rule are inconsistent with respect for the freedom of all individuals, which has become a central tenet of the legal and moral fabric of this country particularly since the adoption of the *Charter*. In *R.* v. *Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, Dickson J. (as he then was) defined freedom in this way (at p. 336): "Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person." The common law rule making a spouse an incompetent witness involves a conflict between the right of the individual to choose freely whether or not to testify and the interests of society in preserving the marriage bond.
>
> To give paramountcy to the marriage bond over the right of individual choice in cases of irreconcilable separation may have been appropriate in Lord Coke's time, when a woman's legal personality was incorporated in that of her husband on marriage, but it is inappropriate in the age of the *Charter*. As Wilson J. put it in *R.* v. *Morgentaler*, [1988] 1 S.C.R. 30, at p. 166, the *Charter* requires that individual choices not be restricted unnecessarily.
>
> The idea of human dignity finds expression in almost every right and freedom guaranteed in the *Charter*. Individuals are afforded the right to choose their own religion and their own philosophy of life, the right to choose with whom they will associate and how they will express themselves, the right to choose where they will live and what occupation they will pursue. These are all examples of the basic theory underlying the *Charter*, namely that the state will respect choices made by individuals and, to the greatest extent possible, will avoid subordinating these choices to any one conception of the good life.
>
> Through its family and divorce laws, our society has recognized that spouses have the right to seek dissolution of the marriage where relations between them have irrevocably broken down. The recognition that a marriage may be dissolved is reflected in the long history of divorce legislation...[289]

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[288] *Salituro*, *supra* note 286.

[289] *Ibid.* at 673-674. See also *Hawkins*, *supra* note 285 ("rendering a person incapable of testifying solely on the basis of marital status does strip an individual of key aspects of his or her autonomy").

Justice Iacobucci's reasoning in *Salituro* led him to conclude that the common law rules of spousal incompetence should not apply in situations where the spouses are irreconcilably separated. This issue was easily resolved "because there is no marital harmony to be preserved."[290] He left open the "difficult question" of whether the spousal incompetence rule should be abrogated more broadly.[291] In our view, the reasoning in *Salituro* provides a compelling basis for making spouses competent witnesses for the prosecution in all circumstances. Justice Iacobucci acknowledged that the principles he espoused "favour abolishing the rule entirely and making all spouses competent witnesses in all circumstances".[292] However, he suggested that "a far-reaching change of this kind is best left to the legislature".[293]

There is not necessarily a conflict between the public interest in promoting marital harmony and the individual's right to choose whether or not to testify. As Iacobucci J.'s comments suggest, changes in divorce laws reflect the abandonment of the notion that society ought to impose a different view of the worth of a particular marital relationship on a participant to that relationship. A witness spouse is in the best position to measure the value of the relationship and the degree to which its integrity may be threatened by testifying. As Lamer C.J. and Iacobucci J. commented in *R. v. Hawkins*, an approach that vests the spouse of an accused with the choice to testify against his or her partner is more consistent with the protection of the marital harmony as well as the autonomy and dignity of the individual.[294]

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[290] *Salituro, supra* note *286* at 676.

[291] *Ibid.* at 673.

[292] *Ibid.* at 677.

[293] *Ibid.* at 678. See also *Hawkins, supra* note 285 at 1071 para. 42, ("it is our opinion that any significant change to the rule should not be made by the courts, but should rather be left to Parliament", per Lamer C.J. and Iacobucci J.).

[294] *Hawkins, supra* note 285 at 1071 para. 41. See also the comments of La Forest J. in *Hawkins*, at 1095 para. 101: "A rule prohibiting a spouse from testifying if he or she wishes raises serious questions about whether it unreasonably infringes on a person's liberty and equality interests protected by the Canadian Charter of Rights and Freedoms. Such an infringement would, in my view, require justification..." See also Hamish Stewart, "Spousal Incompetency and the Charter", (1996) 34 Osgoode Hall L.J. 411, 415: "A rule which says that a spouse cannot testify against an accused, purely by virtue of her status, smacks of ancient doctrines, like coverture, that denied that married women could be, independent of their husbands, full participants in public life."

The more difficult question is whether a witness spouse should also be a compellable witness for the prosecution in all cases. There are two main advantages of such a rule. First, courts would have the benefit of relevant spousal testimony and therefore the pre-eminent goal of a criminal trial - ascertaining the truth - would be advanced. Second, a witness spouse will be less exposed to potential intimidation or violence by an accused (or associates of an accused) since he or she would have no choice but to testify.[295] The disadvantage of making a spouse compellable for the prosecution is that the witness will be forced to testify even in circumstances where he or she believes that the integrity of his or her relationship with the accused will suffer. The difficulty of balancing these competing concerns is reflected in the current patchwork of exceptions to the rule of spousal non-compellability developed under the common law and augmented by sections 4(2) and 4(4) of the *Canada Evidence Act*.

There is no doubt that the current balance achieved by the common law and the Act between truth-seeking and marital harmony is unprincipled. The case for reform is strong. Two options strike us as worthy of consideration.

The first is to make spouses compellable in all cases on the grounds that the contribution of the non-compellability rule to marital harmony is outweighed by the importance of admitting probative evidence in criminal trials. In other words, the judgment made by sections 4(2) and 4(4) of the Act – that the pursuit of truth outweighs the protection of relational harmony - should not be limited to the listed offences, but is equally compelling in any criminal trial.

The second option is to empower judges to decide on a case by case basis whether the balancing of the competing policies favours compellability or not. This was the approach advocated by the Law Reform Commission of Canada in their *Report on Evidence* (1975). The Commission

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[295] McLachlin J.A. (as she then was) argued in *R.* v. *McGinty*, [1986] 4 W.W.R. 97, 100, that the public policy of preventing spousal abuse leans in favour of a rule of making a spouse compellable in trials where the accused is charged with spousal violence. Arguably the same policy concerns lean in favour of a rule of spousal compellabilityin all cases.

recommended the adoption of a general rule that all persons are competent and compellable, subject to the following exception for witnesses related to the accused:

> In a criminal proceeding, a person who is related to the accused by family or similar ties is not compellable to be a witness for the prosecution if, having regard to the nature of the relationship, the probable probative value of the evidence and the seriousness of the offence charged, the need for a person's testimony is outweighed by the possible disruption of the relationship or the harshness of compelling the person to testify.[296]

While this proposal aims to implement a more accurate balance between the relevant competing concerns than the crude balance achieved by s.4, it has a number of serious disadvantages. The *ad hoc* balancing involved makes its application in any given case unpredictable and subject to appeal.[297] In addition, its application requires an intrusive inquiry into the nature of the intimate relationship at stake. The invasion of privacy required by such an inquiry is itself a threat to relational harmony. We are also persuaded that a compellability rule is likely to reduce the exposure of witness spouses to the threat of intimidation or violence. While the difficulty of measuring the contribution that the non-compellability rule makes to relational harmony gives us some pause, on balance we believe that Parliament would be best advised to remove the limits on spousal compellability entirely, rather than extend the rule to broader categories of relationships or offences on a case-by-case basis.

The case for preserving the privileged nature of marital communications is stronger. For one, the privilege is limited to private, intimate communications. It does not deprive a court of all of a spouse's relevant testimony. It thus achieves a better balance of competing concerns than that achieved by the rules on competence and compellability. Since the rationale for the privilege is the protection of privacy and the promotion of candour and trust in intimate adult relationships, there is much value in the Law Reform Commission of Canada's recommendation that the privilege ought to attach to the speaker rather than the witness.[298]

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[296] Law Reform Commission of Canada, *Report on Evidence* (Ottawa: The Commission, 1975) at 37 (section 57 of draft Evidence Code).

[297] This point is made in the dissenting comments of Commissioner La Forest (as he then was), *ibid.* at 80.

[298] *Ibid.* at 79.

In conclusion, the strong arguments in favour of abolishing the special rules on spousal competence and compellability ought to lead to the repeal of those rules. The marital communications privilege in section 4(3) of the Act is more narrowly drawn to protect important relational interests without unduly compromising the search for truth. The privilege in section 4(3) should be retained and extended to a broader range of adult personal relationships. The question of how to define the scope of relationships covered is one we return to in Part II (B), below.

IV. Spousal/Relational Definitions

In this section, we review the spousal and relational definitions that are being used to promote otherwise legitimate state objectives. Spousal definitions were extended beyond married couples in a limited and haphazard manner, on a statute by statute basis. Much federal legislation was left untouched, some was only partially extended, and much was extended with little to no consideration of a comprehensive or consistent policy towards the regulation of adult relationships. The landscape of spousal definitions is entirely changed with the introduction of Bill C-23. Conjugal relationships will be now more extensively included within federal legislation, although the process of inclusion is not complete. As we will highlight, some federal statutes continue to apply to married couples only.

Bill C-23 does not address the broader category of relational definitions in the same way as it systematically addresses the legal situation of spouses and partners. As a result, federal legislation will remain essentially unchanged by Bill C-23 in its treatment of non-conjugal relationships. A range of relational terms and definitions are used in federal legislation, including dependent, related persons, near relative, immediate family, and members of a family who are part of a household. There is no consistency to the ways in which groups of individuals are defined or included within federal legislation. Nor is there any consistency to the ways in which the relational terms are

deployed. 'Dependent', for example, is subject to a range of different definitions across different federal statutes.

In this section, we map the existing spousal and relational definitions in federal legislation. We begin with a review of spousal definitions, and highlight the changes that will be introduced upon the enactment of Bill C-23, the *Modernization of Benefits and Obligations Act.* We then review the range of relational definitions deployed in federal legislation.

A. Spousal/Conjugal Definitions

Prior to Bill C-23, "spouse" in federal legislation referred to married spouses, and in the *Income Tax Act* and pension statutes, spouse also included common law opposite-sex couples. Bill C-23 will significantly amend these spousal definitions. It has introduced a new term – "common law partner" and "common law partnership"– defined as "a relationship between two persons who are cohabiting in a conjugal relationship, having so cohabited for a period of at least one year." This common law partner definition will replace the extended definition of spouse through which common law heterosexual couples were previously included within federal pension and tax legislation. Spouse will now mean married persons, and common law partner means any two persons living in a conjugal relationship for at least one year.

Bill C-23 will extend to common law partners a vast number of federal provisions that previously applied only to married spouses.[299] It will also extend to same-sex couples a number of statutory provisions that previously applied to married spouses and common law opposite-sex couples.[300] The Bill leaves unchanged a handful of federal statutes that apply only to married spouses.[301]

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[299] See Appendix B1.

[300] See Appendix B2.

[301] See Appendix B4.

B. Relational Definitions

Federal legislation uses a broad range of relational terms to pursue otherwise valid relational objectives. Table Four outlines the range of these relational terms, with examples of federal statutes that use them.

TABLE FOUR

RELATIONAL TERMS IN FEDERAL STATUTES

Relational term	**Examples of Federal Statutes**
Assisted Relative	*Immigration Act*
Associate, Associated persons	*Canada Business Corporations Act* *Canada Cooperative Act* *Special Import Measures Act* *Insurance Companies Act* *Trust and Loan Companies Act*
Dependant[302]	*Canada Elections Act* *Canada Shipping Act* *Foreign Missions and International Organizations Act* *Immigration Act* *Merchant Seaman Compensation Act* *Visiting Forces Act*
Family	*Cooperative Credit Associations Act* *Corrections and Conditional Release Act* *Excise Tax Act* *Firearms Act* *Insurance Companies Act* Trust and Loan Companies Act
Family class	*Immigration Act*
Immediate family	*Canada Labour Code* *North Atlantic Treaty Organization Act*
Interested Person	*Business Development Bank of Canada Act*
Members of family, forming part of household	*Foreign Missions and International Organizations Act* *Criminal Code*

[302] The chart includes examples of statutes with definitions of dependant. There are many additional statutes that include a generic use of the term "dependant" that are not listed here.

	Carriage by Air Act
Near relative	*Canada Shipping Act*
Person who because of relationship or association with a person	*Witness Protection Program Act*
Related person	*Bankruptcy and Insolvency Act* *Special Import Measures Act* *Customs Act* *Excise Tax Act*
Relative	*Corrections and Conditional Release Act* *Criminal Code*

Some of the relational terms are deployed consistently across federal legislation. "Associate" and "related person" for example are used quite consistently. By contrast, "dependant" and "immediate family" have very different definitions in different contexts. To further add to the confusion, some of the relational definitions were amended as a result of Bill C-23, but many were not. (See Appendix B5 and B6). In the following section, we briefly review the range of the definitions of these relational terms found in federal statutes.

Associate and Related Person

The term "associate" generally includes a person's spouse or common law partner, a child of that person or of the spouse or common law partner, and a relative of the person or the person's spouse or common law partner, if that relative has the same residence.[303] Similarly, the term "related person" is defined quite consistently through federal legislation, as "persons are related to each other if connected by blood relationship, marriage, common law partnership or adoption". [304]

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[303] For example, the *Canada Business Corporations Act* defines associate as including "a person's (d) spouse of that person or an individual who is cohabiting with that person in a conjugal relationships, having so cohabited for a period of at least one year, (e) a child of that person or of the spouse or person referred to in para (d) and (f) a relative of the person or of the spouse or individual referred to in para (d) if that relative has the same residence as the person. See also the *Canada Cooperative Act* and the *Canadian Corporations Act.*

Other statutes use slightly different language, but still capture the same group of people. For example, the *Bank Act* defines 'associate' as including "spouse, or common law partner of the offeror, child of the offeror or of the offeror's spouse or common law partner, or relative of the offeror or of the offeror's spouse or common law partner, if that relative has the same residence." See also the *Insurance Companies Act* and the *Trust and Loan Companies Act.*

[304] Related person is usually defined specifically in relation to section 251 of the *Income Tax Act.* For example, section 45(3)(a) of the *Customs Act* states that " ...persons are related to each other if (a) they are individuals connected by blood relationship, marriage, common law partnership or adoption within the meaning of s.251(6) of the *Income Tax Act.*" See also the *Bankruptcy and Insolvency Act*, the *Excise Tax Act*, and the *Special Import Measures Act.*

Dependant

"Dependant" is sometimes defined within federal statutes. However, as Table Five illustrates, there is no consistency in these definitions.

TABLE FIVE

DEFINITIONS OF DEPENDANT

Statute	Definition
Canada Elections Act	Dependent means a spouse, common law partner or relative who ordinarily resides with the elector. A relative is someone who is related by blood or marriage. (s. 21(3)Schedule 2, part 3)
Canada Shipping Act	Dependant means the wife, husband, parents and children of a deceased person. (s. 645)
Foreign Missions and International Organizations Act	Dependent means "spouses and relatives dependent on them"
Immigration Act	Accompanying dependent means a spouse, or unmarried son or daughter under the age of 19.
Merchant Seaman Compensation Act	Dependants means members of the family of a seaman who were wholly or partly dependent on his earnings when he died or, but for incapacity of the seaman due to an accident, would have been so dependent. (s. 2(1))
Pension Act, ss.48 & 49	Dependant means a surviving spouse or child of a member to whom a pension may be paid under this part (s.48(1)).
Pension Act, s. 42	Dependant means any person entitled under court order to support. (s.42(1)).
Visiting Forces Act	Dependant means a person who forms part of the member's household and depends on the member for support. (s.2)

A brief review of the definitions in Table Five illustrates that some of these definitions will be amended by Bill C-23 (see for example, the *Canada Elections Act* which now incorporates common law partner, and the *Visiting Forces Act* wherein the definition of dependant was broadened), while others were not. (See for example the *Canada Shipping Act*, which continues to use the language of husband and wife, and the *Foreign Missions and International Organizations Act*, which did not

add common law partners.) Further, there is a broad range of federal statutes that use the term "dependant", but do not define it.[305]

Immediate Family

Several statutes use the term "immediate family". The *Canada Labour Code* provides for bereavement leave for members of immediate family.[306] The term is defined in the regulations as "(a) the spouse of the employee, including common law spouse, (b) the father and mother of the employee and the spouse of the father or mother, including common law spouse, (c) the children of the employee (d) the brothers and sisters of the employee (e) the father in law and mother in law of the employee and the spouse of the father in law or mother in law, including common law (f) any relative of the employee who resides permanently in the employee's household or with whom the employee permanently resides."[307] The *Canada Labour Code* will not be amended by Bill C-23.

The *North Atlantic Treaty Organization Act* also uses the term "immediate family".[308] Schedule, Part 4, s.2, Article 18 provides that the "Officials of the Organisation...shall (b) be granted, together with their spouses and members of their immediate family residing with and dependant on them..." It was not included within Bill C-23.

Family class

The *Immigration Act* uses the relational term "family class", to allow an individual to sponsor a broad but specified range of relatives under the family reunification program. "Family Class" is currently defined (SOR/93-4) as including:

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[305] See for example, *Bank of Canada Act*; *Broadcasting Act*, S.C. 1991, c. 11; *Business Development Bank of Canada Act*; *Canada Mortgage and Housing Corporation Act*, R.S.C., c. C-16, s. 1; 1978-79, c. 16, s. 12; *Cape Breton Development Corporation Act*, R.S.C.1985, c. C-25; *Farm Products Agencies Act*, R.S.C.1985,c. F-4, S.C. 1993, c-3, s. 2; *Royal Canadian Mounted Police Act*, R.S.C.1985, c. R-10; *Public Service Superannuation Act*, *Canada Corporations Act*, *European Bank for Reconstruction and Development Agreement Act*, S.C. 1991, c. 12; *Veterans Review and Appeal Board Act*, S.C. 1995, c. 18; *Corrections and Conditional Release Act*; *Criminal Code*; *Department of Veteran Affairs Act*, R.S.C.1985, c. V-1; *Civilian War-related Benefits Act*, R.S.C.1985, c.C-31.

[306] *Canada Labour Code*, R.S.C. 1985, c. L-2, s.210.

[307] SOR/78-560, s.5, SOR/91-461, s.35.

[308] *Privileges and Immunities (North Atlantic Treaty Organisation) Act*, R.S.C. 1985, c. P-24.

(a) the sponsor's spouse;
(b) the sponsor's dependent son or dependent daughter;[309]
(c) the sponsor's father or mother;
(d) the sponsor's grandmother or grandfather;
(e) the sponsor's brother, sister, nephew, niece, grandson or granddaughter, who is an orphan and is under 19 years of age and unmarried;
(f) the sponsor's fiancee;
(g) any child under 19 years of age whom the sponsor intends to adopt and who is
    (i) an orphan
    (ii) an abandoned child whose parents cannot be identified
    (iii) a child born outside of marriage who has been placed with a child welfare authority for adoption
    (iv) a child whose parents are separated and who has been placed with a child welfare authority for adoption
    (v) a child one of whose parents is deceased and who has been placed with a child welfare authority for adoption, or
(h) one relation regardless of age or relationship to sponsor where sponsor does not have a spouse, son, daughter, father, mother, grandfather, grandmother, brother, sister, uncle, aunt, nephew or niece who is a Canadian citizen, permanent resident or whose application for landing the sponsor may otherwise sponsor.

The amendments to the family class promised by the Minister of Citizenship will broaden the definition of spouse to include common law partners, as well as broaden the definition of dependent child by increasing the age from 19 to 22.[310]

Assisted Relatives

The *Immigration Act* also uses the relational term "assisted relatives". "Assisted relatives" are part of the independent class of immigration applications, but who are awarded bonus points by virtue of their relational status to a Canadian citizen or permanent resident.[311] Assisted relative is defined as "a relative other than a member of the family class, who is an immigrant and is an uncle

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[309] Prior to 1988, the family class consisted of parents and their dependent children up to 21 years of age and unmarried. In July 1988, family class was expanded to include all unmarried children, regardless of their age. In 1993, the regulations were amended to reduce the family class to encompass only those unmarried children who were 19 years of age or under, and those children over 19 years who were dependent, either as a result of being students or of having some kind of physical or mental disability. The amendments to "family class" promised by the Minister will again revise the age from 19 to 22 years.

[310] Citizenship and Immigration Canada, *supra* note 129.

[311] Prior to 1993 assisted relatives were awarded more bonus points (15 for brothers, sisters and married children; ten bonus points for more distant relations. The bonus points made it relatively easy for assisted relatives to achieve the total 70 point pass mark. Thus large numbers of applicants could qualify as assisted relatives because of the bonus

or aunt, a brother or sister, a son or daughter, a nephew or niece or a grandson or granddaughter of a Canadian citizen or permanent resident who is at least 19 years of age and who resides in Canada". [312]

Near Relative

The *Canada Shipping Act* uses the term "near relative", which is defined in s.191(4). "Near relative means one of the following persons, namely, the spouse, father, mother, grandfather, grandmother, child, grandchild, brother or sister of the seaman." It will not be amended by Bill C-23.

Person who because of the relationship or association with a person

The *Witness Protection Program Act* uses a very broad relational term. Section 2 provides that for the purposes of the witness protection program, a witness includes not only a person who has given information or evidence, but also (b) "a person who because of their relationship to or association with a person referred to in paragraph (a) may also require protection for the reasons referred to in that paragraph".[313]

C. Conclusion

While the expected passage of Bill C-23 will result in greater consistency in spousal and common law definitions, the process of inclusion for cohabiting couples remains incomplete. Several federal statutes continue to apply only to married couples. Further, as this section has illustrated, the inclusion of non-conjugal relationships remains both partial and inconsistent. An array of relational terms are deployed in different federal statutes, that include some non-conjugal relationships for some purposes, but not others. Nor is there any consistency in the relationships that are included –

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points they received. An amendment to the Regulations, SOR/93-44, January 1993 reduced the bonus points awarded to assisted relatives.

[312] SOR/93-44 1993.

[313] *Witness Protection Program Act*, S.C. 1996, c.15, s. 2.

sometimes the definition is narrow, other times it is wider. Moreover, for the most part, these relational definitions are limited to familial relationships, that is, persons related by blood, marriage, common law partnership or adoption. They do not include close personal relationships between individuals who are not so related.

Many otherwise legitimate objectives of state regulation could arguably be furthered by the inclusion of these excluded relationships. Basic equality norms require that the process of including conjugal relationships be completed. There is no longer any legitimate justification for the exclusion of these conjugal couples. Federal objectives would only be furthered by completing the process of inclusion. The question of the inclusion of non-conjugal couples is, admittedly, more complex. However, as we will also argue further below, a compelling case can be made that many federal objectives could be furthered by the inclusion of a broader range of non-conjugal relationships. The question is one, however, that we believe must be addressed on an objective by objective/ statute by statute basis.

PART TWO

FRAMING THE STATE'S ROLE TOWARD ADULT PERSONAL RELATIONSHIPS

Part Two of this paper considers how adult personal relationships ought to be defined for the purposes of legal regulation. We canvas the range of options for including adult personal relationships, and assess the advantages and disadvantages of these various legislative means of identifying adult personal relationships relevant to particular policy goals. Finally, we will attempt to make recommendations appropriate to each of the main state policy objectives identified in Part I as legitimate.

I. Legal options for identifying adult relationships

In this section, we review the different legislative models for identifying and defining adult relationships. We consider both the models that federal legislation currently uses, such as marriage and deemed or ascribed spousal/relational status, as well as alternative models such as domestic partnership regimes and new statutory relationship definitions.

A. Marriage

In the past, the state has used marriage as a proxy for commitment and for identifying the relationships worthy of legal recognition. But, the transformations in the Canadian family in the last three decades has seriously undermined the utility of this proxy. Marriage is now both over-inclusive and under-inclusive of the kinds of relationships that may deserve legal recognition in light of legitimate policy objectives. For example, laws may be over-inclusive in presuming that all married

persons form units with an identity of financial interests (e.g. laws dealing with conflicts of interest), when in fact some married couples may not pool their resources or even live together. Many other laws dealing with the consequences of interdependent personal relationships may be under-inclusive in their application only to married persons. Many other relationships may possess the qualitative attributes relevant to the objectives of the laws (e.g., the definition of "dependants" entitled to bring a wrongful death action pursuant to s.645 of the *Canada Shipping Act*).

1. Current definition

As discussed above, the federal government has rarely exercised its jurisdiction in relation to marriage, and as a result, the essential validity continues to be governed largely by common law, and in Quebec, by the Civil Code. At its most general, marriage has been defined at common law as the "voluntary union of life of one man and one woman, to the exclusion of all others".[314] This passage continues to be cited by the courts as an authoritative definition of marriage.[315]

In the immediate aftermath of the Supreme Court of Canada decision in *M. v. H.*, Parliament moved to defend the opposite-sex definition of marriage. On June 8, 1999, the House of Commons, by a vote of 216-55, approved a motion brought by the Reform Party stating that "it is necessary...to state that marriage is and should remain the union of one man and one woman to the exclusion of all others".[316] However, the motion itself has no legal force. The government has been under pressure to pass legislation to accomplish the goals of the motion. There is only one step, short of constitutional amendment, that Parliament could take to protect the common law definition of marriage from constitutional challenge in the courts. Parliament could reproduce the definition in legislation that

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[314] *Hyde v. Hyde & Woodmansee* (1866), L.R. 1 P. & D. 130, in which Lord Penzance, stated at 133 "I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others" [hereinafter *Hyde*].

[315] See *Re North and Matheson* (1974), 52 D.L.R. (3d) 280, *Layland v. Ontario* (1993), 14 O.R. (3d) 658 [hereinafter *Layland*].

[316] *House of Commons Debates (Hansard)* (8 June 1999) at 1020.

included a notwithstanding clause. Such a step would immunize the definition of marriage from a challenge based on sections 2 or 7 to 15 of the *Charter* for a period of five years.

When Bill C-23 was introduced in the House of Commons in February 2000, it did not contain a definition of marriage. The Minister of Justice emphasized in her statements to the House on second reading that the Bill did not change the legal definition of marriage. In the face of arguments that the Bill undermines the status of marriage, the government proposed an amendment in committee that became section 1.1 of the Bill as passed by the House of Commons on April 11, 2000. Section 1.1 provides as follows:

> For greater certainty, the amendments made by this Act do not affect the meaning of the word "marriage", that is, the lawful union of one man and one woman to the exclusion of all others.

If Bill C-23 is passed without further amendment by the Senate, section 1.1 of the *Modernization of Benefits and Obligations Act* will become the first provision of federal legislation to make reference to the common law definition of marriage. Section 1.1 does nothing more than give prominence and clear expression to the reform option not chosen: Parliament chose not to touch the definition of marriage in Bill C-23. The political purpose of section 1.1 is easy to understand: the government felt under pressure to signal its desire to preserve the definition of marriage from legal challenges by same-sex couples. On the other hand, section 1.1 has little legal significance. Parliament's unwillingness to change the opposite-sex requirement of marriage had already been conveyed in unambiguous terms. Bill C-23, like all other federal statutes, must comply with the *Charter*. So long as Parliament remains averse to employing the notwithstanding clause of the *Charter* to limit judicial review of federal legislation, the definition of marriage will remain vulnerable to a constitutional challenge.

2. Over-inclusiveness

As a proxy for marking those relationships deserving of legal recognition, marriage is potentially over-inclusive. For example, many conflict of interest laws assumed that all married couples constitute a single economic unit, with an identity of financial interests. These laws

presuppose that married couples pool their resources and share financial information. While many married couples do so, some married couples do not pool their resources. Some may not even live together. Using marriage as a proxy neglects any consideration of whether the couple actually has shared financial interests. Using marriage as a proxy also assumes that married couples live together in these economic units.

3. Under-inclusiveness

Marriage, as currently defined, is also under-inclusive of the kinds of relationships deserving of legal recognition. Prior to the introduction of Bill C-23, unmarried cohabiting couples – of both the same and opposite sex - were excluded from many of the legal rights and responsibilities that were extended to married couples. While Bill C-23 will wed common law partners with married spouses in almost all federal statutes, there are a number of significant federal statutory provisions that remain restricted in their application to married couples. If the government follows through on its stated commitments to amend the *Immigration Act*, the *Canada Evidence Act*, and the *Canada Shipping Act*, implementation of the principle of equal treatment of common law partners and married spouses will be near completion in federal legislation.

(a) Same-sex couples

The opposite-sex definition of marriage excludes same-sex couples from entering into a legally valid marriage. Unlike cohabiting heterosexual couples who *might* be said to be choosing to remain outside of the institution of marriage, the prohibition on same-sex marriage operates to preclude same-sex couples from opting into marriage. As a result, same-sex couples do not have access to the bundle of benefits and obligations that extend only to married couples. At the provincial level, British Columbia,[317] Ontario[318] and Quebec[319] have taken large steps forward in

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[317] *Adoption Act*, R.S.B.C. 1996, c.5; *Family Relations Amendment Act, 1997*, S.B.C. 1997, c.20; *Family Maintenance Enforcement Amendment Act*, S.B.C. 1997, c.20; *Pension Statute Amendment Act (No. 2), 1998*, S.B.C. 1998, c.40.

recognizing the equality rights of same-sex couples. Outside the context of public employment rights, same-sex couples remain legally unrecognized in the other jurisdictions. Even in the three provinces that have moved forward, important benefits and obligations continue to be restricted to married couples. This is the case, for example, with the provisions of all provincial family laws dealing with the division of property on relationship break down.[320]

In this section, we begin with a review of the existing case law involving same-sex couples and marriage, as well as developments in other jurisdictions. We then interrogate the constitutionality of the opposite-sex definition of marriage, in light of the most recent Supreme Court of Canada equality jurisprudence.

(i) Challenges to opposite-sex requirement of valid marriage

The opposite-sex requirement of a valid marriage has been unsuccessfully challenged by same-sex couples. In the pre-*Charter* case of *Re North and Matheson*,[321] two gay men sought an order requiring the registration of their marriage. The registrar had refused to issue them a marriage licence. Philp Co.Ct. J. held that the ceremony in which the two men had participated was not a marriage. The judge reviewed the definition of marriage in the case law, citing passages affirming the opposite-sex requirement in the English cases of *Hyde v. Hyde*[322] and *Corbett v. Corbett*.[323] He further reviewed several dictionary and encyclopaedia definitions, which all described marriage as

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[318] *An Act to amend certain statutes because of the Supreme Court of Canada decision in M. v. H.*, S.O. 1999, c.6 (Bill 5).

[319] *An Act to amend various legislative provisions concerning de facto spouses*, S.Q. 1999, c.14.

[320] This state of affairs is not likely to persist. Two provincial court rulings have held that the denial of the right to seek a division of family property to unmarred opposite-sex conjugal cohabitants violates the prohibition on marital status discrimination in section 15 of the *Charter*. *Walsh* v. *Bona*, 2000 NSCA 53; *Watch* v. *Watch*, [1999] S.J. No. 490 (Q.B.).

[321] (1974), 52 D.L.R. (3d) 280 (Man. Co. Ct.).

[322] *Hyde*, *supra* note 314 at 133 ("...marriage as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others").

[323] [1970] 2 All E.R. 33 ("..sex is clearly an essential determinant of the relationship called marriage, because it is and always had been recognized as the union of man and woman").

the union of a man and a woman. He concluded that because a valid marriage requires parties of the opposite sex, the marriage between the two men was legally non-existent.

In *Layland* v. *Ontario (Minister of Consumer and Commercial Relations)*,[324] a majority of the Ontario Divisional Court rejected a constitutional challenge to the opposite-sex definition of marriage. Two gay men made an application for judicial review of the refusal of the city clerk's office to issue them a marriage licence. The applicants argued that the common law requirement of opposite sexes violated their equality rights under section 15 of the *Charter*. Justice Southey, writing for the majority, reviewed the common law requirement that a valid marriage can only take place between a man and a woman, citing extensively from *North and Matheson*. He relied on biological difference to reject the argument that the opposite-sex requirement violated the applicants' equality rights:

> One of the principal purposes of the institution of marriage is the founding and maintaining of families in which children will be produced and cared for, a procedure which is necessary for the continuance of the species...That principal purpose of marriage cannot, as a general rule, be achieved in a homosexual union because of the biological limitations of such a union.[325]

Nor did Justice Southey's opinion accord much weight to the value of relational autonomy. He commented that "the law does not prohibit marriage by homosexuals, provided it takes place between persons of the opposite sex". [326]

In her dissenting opinion, Greer J. was of the view that the opposite-sex requirement of marriage did violate the applicants' equality rights. She took the view that the state's interest in promoting marriage and family should be related to function not form:

> ...it is surely in the interest of the state to foster all family relationships, be they heterosexual or same-sex relationships....To say that the state must preserve only traditional heterosexual families is discriminatory and contrary to the equal benefits and guarantees they are entitled to at law. [327]

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[324] (1993), 104 D.L.R. (4th) 214 (Ont. Div. Ct.).

[325] *Ibid.* at 222-223.

[326] *Ibid.*

[327] *Ibid.* at 233.

In her view, the common law should evolve to reflect society's changing needs. Justice Greer rejected the argument of the Ontario Attorney General "that there is only one societal concept of marriage":

> One has only to examine how multiple marriages have become almost the norm in our North American society, how step-parents have become an integral part of children's lives in these marriages, how divorce has become widely recognized in society, and how 'common law' relationships have become classified as marriages without the sanction of a marriage certificate but with most of the benefits conferred by one. There was even a time in history when a woman became the property of her husband. That concept of marriage became no longer valid and the institution of marriage had to adjust to such changes. The common law and legislated law both change to meet a changing society. [328]

(ii) Same-sex Marriage in Other Jurisdictions

The Netherlands has made a commitment to legally recognize same-sex marriages by January 1, 2001. No other jurisdiction has taken this step. Other European countries that have moved towards the recognition of same-sex relationships have done so primarily through the enactment of domestic partnership regimes. In Norway, for example, politicians considered and rejected the recognition of same-sex marriage, preferring the recognition of same-sex relationships through domestic partnership regimes. "A homosexual relationship can ...never be the same as marriage, neither socially nor from a religious point of view. It does not replace or compete with heterosexual marriage."[329] The constitutionality of the opposite-sex definition of marriage is a highly contested issue in the United States. In *Baehr v. Lewin*,[330] the Hawaii Supreme Court held that the state law denying same-sex couples access to marital status would violate the state constitution's equal protection clause unless the state could demonstrate that the exclusion was necessary to the pursuit of a compelling state purpose. On remand, the Circuit Court held that the State of Hawaii presented insufficient evidence to prove that same-sex marriages would result in adverse consequences to the public interest. The case was appealed again to the Hawaii Supreme Court. In

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[328] *Ibid.* at 236-237.

[329] Peter Lodrup "Registered Partnership in Norway" in Andrew Bainham, ed., *The International Survey of Family Law* 387 (The Hague, Netherlands: Martinus Nijhoff, 1994) at 391-2.

the meantime, Congress initiated "proactive" measures to defend marriage from challenges by same-sex couples, and in 1996, passed the *Defense of Marriage Act*.[331] The Hawaii legislature has since passed a constitutional amendment restricting marriage to opposite-sex couples. The Hawaii Supreme Court subsequently concluded that the coming into force of this amendment meant that the opposite-sex definition of marriage no longer violated the state constitution.[332]

The Hawaii legislature's response to same-sex couples' struggle for legal recognition was the passage of a reciprocal beneficiaries law, entitled *An Act Relating to Unmarried Couples*.[333] The stated purpose of the legislation is to extend certain rights and benefits to couples who are legally prohibited from marrying because they are of the same sex or within the prohibited degrees of consanguinity.[334] The legislation repeats the legislature's finding that "the people of Hawaii choose to preserve the tradition of marriage as a unique social institution based upon the committed union of one man and one woman."

In 1999, the Supreme Court of Vermont ruled in *Baker v. State* that the state law excluding same-sex couples from marriage violated the common benefits clause of the Vermont constitution.[335] It held that:

> ...the state is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law. Whether this ultimately takes the form of inclusion within marriage laws themselves or a parallel "domestic partnership" system or some equivalent statutory alternative, rests with the legislature.[336]

The Court thereby gave the legislature two options: it could amend the definition of marriage to allow same-sex couples to marry, or it could introduce a domestic partnership regime which would extend to same-sex couples all the same rights and responsibilities as married couples. The Vermont

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[330] 852 P.2d 44 (Haw. 1993). See Martha Bailey, "Hawaii's Same-sex Marriage Initiatives: Implications for Canada", (1998) 15 Can. J. Fam. L. 153.

[331] 110 Stat. 2419 (1996).

[332] *Baehr* v. *Miike*, 994 P.2d 566 (Hawaii Sup. Ct. 1999).

[333] This statute is discussed in further detail, *infra* at notes378-389.

[334] Hawaii Revised Statutes 1999, s.572C-1.

[335] 744 A. 2d 864 at 867 (Vermont S.C., 1999).

legislature adopted the latter approach. In April 2000, it passed *An Act relating to Civil Unions*, which enables same-sex couples to register their relationships as "civil unions". Parties to a civil union will have the same legal status as married spouses.

Same-sex marriage remains, then, a controversial and contested issue in many Western jurisdictions. Notwithstanding its controversial nature, however, there is a clear trend towards the legal recognition of same-sex unions. The exclusion of same-sex couples from marriage and its attendant rights and responsibilities is increasingly seen as discriminatory. However, legislatures have not yet chosen to remedy this exclusion by amending the definition of marriage. Instead, they have preferred to create a parallel civil status, like domestic partnership, to accord a package of rights and responsibilities to same-sex couples. We will discuss domestic partnerships in more detail below.

(iii) Recent Supreme Court of Canada equality decisions and the constitutionality of the opposite-sex requirement

In Canada, the approach taken by the majority of the Ontario Divisional Court in *Layland* is unlikely to remain the final word on the question of the constitutionality of the opposite-sex requirement of marriage. The issue has yet to be considered by an appellate court. Moreover, since *Layland* was decided in 1993, Supreme Court of Canada jurisprudence has fundamentally transformed the constitutional landscape. Challenges to the opposite-sex requirement of marriage are on their way to the courts in a number of provinces,[337] and no doubt the issue will eventually find its way to the Supreme Court. As we discuss in more detail below, in the aftermath of *Egan*,[338] *Law*[339] and *M. v. H.*,[340] there is a strong argument that the exclusion of same-sex couples from the

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[336] *Ibid.*

[337] "Gay Couple Fight for Marriage", *The Globe and Mail* (17 December 1998); "City Seeks Clarity on Same-Sex Marriage Licences", *The Globe and Mail* (20 May 2000) A25, "British Columbia Government Backs Same-Sex Marriage" *The Globe and Mail* (27 May 2000) A8..

[338] *Egan* v. *Canada supra* note 32. .

[339] *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.

[340] *M. v. H.*, supra note 79.

definition of marriage would be found to discriminate on the basis of sexual orientation in violation of section 15. More difficult to predict is whether the Court would find the violation to be a reasonable limit under section 1. The decision in *M. v. H.* in particular lends further credence to the argument, advanced by Greer J. in dissent in *Layland*, that the exclusion of same-sex couples from the common law definition of marriage violates the human dignity of gay men and lesbians. In the absence of any other means of relationship recognition, the opposite-sex definition of marriage means that, unlike heterosexual couples, same-sex couples are denied any legally effective means of choosing to have their relationships recognized as spousal by their communities and the government. At the same time, however, the Court in *M.* v. *H.* was emphatic that the constitutional validity of the definition of marriage is a distinct issue from the discriminatory treatment of unmarried conjugal cohabitants. This statement (not to mention the intense political and religious passions engaged by the same-sex marriage debate) makes any attempt at predicting the constitutional future in this area a perilous exercise.

Does the exclusion of same-sex couples violate section 15 of the *Charter*?

In *Law v. Canada (Minister of Employment and Immigration)*, the Supreme Court of Canada summarized the approach the courts should take to claims that the government has violated the equality rights in section 15(1) of the *Charter*. Justice Iacobucci, speaking for a unanimous Court, affirmed that section 15(1) is to be interpreted in a purposive and contextual manner:

> It may be said that the purpose of section 15 is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.[341]

After reviewing the Supreme Court equality jurisprudence, Iacobucci J. summarized the three basic elements of the Court's approach:

> First, does the law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively different treatment between the claimant and others on the basis of one or more personal characteristics?

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[341] *Law, supra* note 339, at paras 41, 51.

> Second, was the claimant subject to differential treatment based on one or more enumerated or analogous grounds? And third, does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect and consideration? [342]

In considering a constitutional challenge to the opposite-sex requirement of marriage, the first step is to ask whether the legal definition of marriage draws a formal distinction on the basis of a personal characteristic. The opposite-sex definition of marriage explicitly excludes same-sex couples, and therefore draws a formal distinction between opposite-sex couples and same-sex couples. The opposite-sex definition of spouse further fails to take into account the disadvantaged position of same-sex couples within Canadian society resulting in substantively different treatment between same-sex couples and opposite-sex couples on the basis of personal characteristics. The current position of same-sex couples imposes disadvantages on them not imposed on opposite-sex couples.

The second step is to ask whether same-sex couples are subject to differential treatment on the basis of a prohibited ground of discrimination. The Supreme Court of Canada has held that sexual orientation is a ground of discrimination prohibited by section 15 of the *Charter*.[343] In *Egan*, the majority of the Court held that sexual orientation is "a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs", and is analogous to other personal characteristics enumerated in section 15(1).[344] There is little question then that the exclusion of same-sex couples from the right to marry would satisfy this step of the test.

The third, and more complicated, step is to ask whether the differential treatment of same-sex couples is discriminatory in a substantive or purposive sense. In *Law*, Justice Iacobucci stated that in this third step, the relevant inquiry is whether the differential treatment

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[342] *Ibid.* at paras. 39.

[343] *Egan*, *supra* note 32; *Vriend* v. *Alberta*, [1998] 1 S.C.R. 493; *M.* v. *H.*, *supra* note x.

[344] *Egan*, *supra* note 32 at para 5.

> ...impose[s] a burden upon or withhold[s] a benefit from the claimant in a manner that reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect and consideration.[345]

Justice Iacobucci reviewed four contextual factors which need to be evaluated to determine whether the impugned government action violates the claimant's dignity and is thus discriminatory in the substantive sense. We will consider each in turn.

1. Any pre-existing disadvantage, stereotyping, prejudice or vulnerability experienced by the individual or group

Same-sex couples have experienced a long history of disadvantage, stereotyping and prejudice. The Supreme Court in *Egan* recognized the "historical, social, political and economic disadvantage suffered by homosexuals".[346] The exclusion of same-sex couples from the institution of marriage has contributed to the stereotype or prejudice that same-sex relationships of caring and commitment are unworthy of public recognition and support.

2. The correspondence or lack of it, between the ground on which a claim is based and the actual need, capacity or circumstances of the claimant or others.

This consideration has been the focus of disagreements between Canadian courts and judges when dealing with claims of discrimination by same-sex couples. One view, that had significant judicial support until 1995, is that differential treatment of same-sex couples corresponds to the actual differences in their procreative capacities.[347] The contrary view is that there are no relevant differences in the needs, capacities or circumstances of same-sex couples that justify their exclusion from laws regulating adult personal relationships. As Cory J. argued in *M.* v. *H.*, same-sex and opposite-sex couples are no different in their ability to form intimate, conjugal relationships characterized by economic interdependence. To exclude them from legislative definitions of spouse,

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[345] *Law, supra* note 339 at para 88.

[346] *Egan, supra* note 32 at para 177.

[347] See, e.g., *ibid.* at para.21 per La Forest J.

he concluded, ignores the facts: the capacity to form intimate relationships characterized by economic interdependence has nothing to do with sexual orientation.[348]

Since 1995, Canadian courts have favoured the functional equivalence approach over the procreative difference approach. The turning point was the Supreme Court of Canada's judgment in *Egan*, in which a 5-4 majority firmly rejected the minority's reliance on procreative difference to justify a gay couple's exclusion from the spousal allowance provisions of the *Old Age Security Act*. Writing for the majority on the equality issue, Cory J. emphasized that same-sex couples "form lasting, caring, mutually supportive relationships with economic interdependence".[349] Their exclusion from the Act was therefore not related to any actual differences in their capacities that were relevant to the objectives of the statutory provision at issue. More recently, in *M.* v. *H.*, Gonthier J. was the lone voice in dissent clinging to an argument founded on "biological and social realities".[350]

The shaky factual and normative foundations of the procreative difference argument have fuelled the shift in the perspective of the courts that has occurred in the past decade. Not all opposite-sex couples have the potential and desire to procreate; many persons in same-sex relationships do. In any case, the state's interest in marriage is not limited to fostering procreation and child-rearing. We have argued that the primary value underlying state regulation of adult personal relationships is the creation of a legal framework in which relationships of caring and commitment are recognized and supported. The courts have now accepted that the sex or sexual orientation of the partners to a relationship has nothing to do with their capacity for care and commitment. As a result, Canadian law now leans strongly in favour of the conclusion that the same-sex marriage bar violates the human dignity of lesbians and gay men.

3. Whether the impugned legislation has an ameliorative purpose or effect on a historically disadvantaged group, and the relative advantage of the excluded group.

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[348] *M.* v. *H.*, *supra* note 79 at para.73.

[349] *Egan*, *supra* note 32 at para.180.

[350] *M.* v. *H.*, *supra* note 79 at para.229.

Justice Iacobucci emphasized that this factor would only defeat a section 15(1) claim if the excluded group is more advantaged than the included group. "Underinclusive legislation that excludes from its scope the members of an historically disadvantaged group will rarely escape the charge of discrimination."[351]

The opposite-sex definition of marriage cannot be said to have an ameliorative purpose or effect for a historically disadvantaged group. Rather, the definition exacerbates the disadvantage of gay men and lesbians by excluding them from the community affirmation and legal recognition that accompanies the right to marry.

4. The nature of the interest affected by the impugned legislation, or more specifically, whether the distinction restricts access to a fundamental social institution or affects a basic aspect of full membership in Canadian society, or constitutes a complete non-recognition of a particular group.

Marriage is an important legal social institution, and there is little doubt that the right to marry is an important aspect of full membership in Canadian society. Until very recently, it has been used as the marker for allocating a wide range of rights and responsibilities. While the passage of Bill C-23 will reduce the significance of marriage as a proxy in federal legislation, several legal entitlements and obligations will continue to be allocated on the basis of marriage. Moreover, marriage is a ceremony through which couples can publicly state their commitment, and seek the recognition and support of family, friends and society. Marriage, even if it is no longer as significant in the allocation of rights and responsibilities, continues to be fundamentally important in terms of the symbolism of legal recognition. To deny same-sex couples the right to marry is to deny gays and lesbians the right to this legal recognition and to participate in this institution.

This brief consideration of a section 15 analysis suggest that the current definition of marriage is very likely to be considered to be a violation of the equality rights of same-sex couples. There is little question that a challenge to the definition of marriage would satisfy the first two steps

of the section 15 analysis – a formal distinction based on an analogous ground. While the third step would be somewhat more contested, it is likely that the definition of marriage will be found to violate the dignity of same-sex couples, and therefore to be discriminatory in a purposive sense.

Is the section 15 violation a reasonable limit within section 1 of the *Charter*?

Assuming that the opposite-sex definition of spouse constitutes discrimination contrary to section 15(1) equality rights, the more difficult question is whether the government could demonstrate that the opposite-sex definition of marriage is a reasonable limit on equality rights within the meaning of section 1 of the *Charter.*

The first step of the section 1 analysis requires that the Court determine whether the objective of the legislation is pressing and substantial.[352] In *Vriend*, the Supreme Court of Canada held that where a law violates the *Charter* owing to under-inclusion, the first stage of the section 1 analysis must address the object of the legislation as a whole, the impugned provisions of the Act, and the omission itself.[353] The second step of the section 1 analysis is the proportionality requirement, which in turn involves three steps: (1) there must be a rational connection between the objectives of the legislation, and the means chosen by the government to implement the objective; (2) the government must demonstrate that the impairment is no more than is reasonably necessary to achieve its goals; and (3) the benefits that accrue from the legislation must be proportional to its deleterious effects as measured by the values underlying the *Charter.* According to this third step, there "must be proportionality between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question and the objectives, and there must be a proportionality between the deleterious and salutary effects of the measures."[354]

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[351] *Law, supra* note 339 at para 72.

[352] *R. v. Oakes* [1986] 1 S.C.R. 103.

[353] *Vriend, supra* note 334 paras 109-111.

[354] *Dagenais* v. *Canadian Broadcasting Corporation,* [1994] 3 S.C.R. 835, at p.889; *Thomson Newspapers v. Canada* [1998] 1 S.C.R. 877, at 968-972.

While the outcome of a section 1 analysis is difficult to predict, there are several stages of the test in which the government may have difficulty meeting its burden of demonstration. There is a serious question as to whether there are pressing and substantial objectives underlying the exclusion of same-sex couples from the definition of marriage. There is some question as to whether the definition of marriage is rationally connected to those objectives. And there is some question as to whether the existing regime can satisfy the requirement of minimal impairment. These questions are explored in further detail below.

Objectives of marriage?

The first step of the section 1 test requires an analysis of the objectives of marriage, and the exclusion of same-sex couples from marriage. What, then, is the objective of marriage? As we discussed above, marriage has served many objectives over time. Citizenship, property, religion, and supporting a sexual division of labour have all been important objectives in the legal regulation of marriage. At its most general, the objective of marriage – at least since the advent of the Church - was the promotion of the integrity of a very particular adult relationship. It was the only socially, religiously and legally sanctioned relationship, and it was the basis for the distribution of a range of rights and responsibilities. Today, marriage is still said to be about reproduction, promoting a stable environment for the nurturing of children, as well as promoting social stability more generally.[355] The Vermont *Civil Unions Act* similarly states that "the state has a strong interest in promoting stable and lasting families. The state's interest in civil marriage is to encourage close and caring families, and to protect all family members from the economic and social consequences of abandonment and divorce, focusing on those who have been especially at risk: women, children and the elderly".[356]

While these may be important objectives, there is a question (discussed in further detail below) whether these objectives are rationally connected to an opposite-sex definition of marriage.

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[355] See Bailey, *supra* note 31.

[356] *An Act Relating to Civil Unions, 2000* section 1(5).

As common law spouses and same-sex partners are extended more and more legal rights and responsibilities, and as these relationships assume many of the same functions of marriage, particularly in relation to the bearing and raising of children, the question is what's left of marriage? What, if anything, is distinctive about marriage, if it is no longer the exclusive basis for the distribution of rights and responsibilities, and no longer the exclusive institution within which children are born and raised?

Marriage remains an important mechanism through which people announce their commitment to a personal relationship. It is a ceremony through which they publicly state their commitment, and seek the recognition and support of family, friends and society. It is the public recognition of the commitment that remains of importance, rather than the legal entitlements that attach. David Chambers describes it as "the single most significant communal ceremony of belonging. It marks not just a joining of two people, but a joining of families and an occasion for tribal celebration and solidarity."[357] The importance of marriage is then largely symbolic. It is a symbol of commitment, and a symbol of the public recognition of the personal relationship. For some, this symbol of commitment remains deeply imbued with religious meaning. For others, the commitment is more secular. And as a symbol of commitment, it does remain an important, but not exclusive, proxy for the assumption of mutual responsibilities. Entering into marriage is a statement of the intention to assume mutual responsibility for financial and emotional well being. And as such, it remains entirely appropriate for marriage to be one of the legal proxies for the imposition of a range of rights and responsibilities.

Objective of the Exclusion

The question that must then be addressed is whether there is any legitimate objective being furthered by the exclusion of same-sex couples from the definition of marriage. Arguments

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[357] David Chambers "What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples" (1996) 95 Michigan Law Review 447 at 450. See also William Eskridge, *The Case for Same Sex Marriage* (New York: Free Press, 1996).

defending the current definition of marriage from same-sex challenges are often cast in the language of defending tradition, and traditional family values. The objective of the exclusion of same-sex couples is said to be the promotion of traditional families. The question is whether protecting marriage is a legitimate objective in its own right? It is certainly a powerful political argument. Indeed it is frequently asserted as self-evident. For example, in introducing Bill C-23, the Minister of Justice stated that the bill ensures the principle of equality,

> ...while preserving the existing legal definition and societal consensus that marriage is the union of one man and one woman to the exclusion of all others....This definition of marriage, which has been consistently applied in Canada and which was reaffirmed last year through a resolution of the House, dates back to 1866. It has served us well and will not change. We recognize that marriage is a fundamental value and important to Canadians. [358]

The promotion of "traditional values" is closely related to the religious basis of marriage. In the West, since the advent of the Christian Church, marriage has been intricately tied to religious belief and practice. For some, marriage remains a sacrament; for others it continues to be practiced according to Christian principles, and is considered to be ordained by God. The Vermont *Civil Unions Act* for example recognized the continuing religious importance of the institution of marriage, noting "the fundamental constitutional right of each of the multitude of religious faiths in Vermont to choose freely and without state interference whom to grant the religious status, sacrament or blessing of marriage under the rules, practices or traditions of such faith". [359]

There is, however, some uncertainty as to whether the promotion of "traditional" and religious values would withstand constitutional review. Specifically, it is unlikely that the promotion of the traditional opposite-sex definition of marriage would qualify as a pressing and substantial objective sufficient to justify the denial of the right to marry to same-sex couples. Giving legal support to one sexual orientation over another violates section 15 of the *Charter*, and the Supreme Court's jurisprudence suggests that objectives that run directly counter to Charter values cannot serve as

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[358] *House of Commons Debates (Hansard)*, 15 February 2000 at 1100.

[359] *An Act Relating to Civil Unions*, section 1(13).

legitimate state objectives at the section 1 stage of analysis. In *R. v. Big M Drug Mart Ltd.*,[360] the Supreme Court held that the purpose of Sunday closing laws was to compel observance of the Christian Sabbath. The Court held that this purpose violated the guarantee of freedom of conscience and religion and therefore could not serve as a justification under section 1. Promoting Christianity was not a legitimate objective because it undermined religious freedom and equality. Similarly, it may be argued that the promotion of marriage as an opposite-sex institution cannot be a legitimate objective precisely because it violates the equality rights of same-sex couples.

A second, related objective for the exclusion of same-sex couples from marriage is often said to be the role of marriage in reproduction. For example, echoing the majority opinion in *Layland*, La Forest J., in his dissenting opinion in *Egan*, was of the view that the objective of marriage is reproduction:

> ...its ultimate raison d'être ....is firmly anchored in the biological and social realities that heterosexual couples have the unique ability to procreate, that most children are the product of these relationships, and that they are generally cared for and nurtured by those who live in that relationship. In this sense, marriage is by nature heterosexual.[361]

It is, in his view, this central overriding objective that justifies the exclusion of same-sex couples. According to La Forest J., same-sex couples are not "capable of meeting the fundamental social objectives" of marriage:

> These couples undoubtedly provide mutual support for one another, and that, no doubt, is of some benefit to society. They may, it is true, occasionally adopt or bring up children, but this is exceptional and in no way affects the general picture.[362]

While supporting the bearing and rearing of children is undoubtedly an important state objective, it is less clear that this objective can justify the exclusion of same-sex couples. Many couples, whether of the same or opposite sex, have children outside of marriage. Indeed, given the increasing number of same-sex couples who have and raise children, a

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[360] [1985] 1 S.C.R. 295.

[361] *Egan, supra* note 32 at para 21.

[362] *Ibid.*

compelling argument could be made that the objectives would be better promoted by the inclusion of these couples within the definition of marriage.

Rational connection

The opposite-sex definition of marriage might also be vulnerable under the rational connection part of the section 1 analysis. Assuming that there are pressing and substantial objectives underlying the current definition of marriage, it may be more difficult to establish a rational connection between these objectives, and the means chosen to implement these objectives. The existing definition of marriage is both over- and under-inclusive in relation to the various stated objectives. For example, marriage is both over-inclusive and under-inclusive in relation to the objective of having and raising children. Many children are now born outside of marriage to both opposite-sex and same-sex couples. And many married couples are choosing not to have children.

In terms of the objective of public commitment and recognition, marriage is also under-inclusive. Only opposite-sex couples can access this public statement of commitment and recognition. And only opposite-sex couples can choose to assume these mutual responsibilities through a public statement of their commitment. There is no similar means whereby same-sex couples can announce their commitment, and seek the public support and legal recognition of their personal relationships. The existence of a registered domestic partnership regime in which same-sex couples, amongst others, could register their relationships and seek the immediate legal recognition of their personal relationships would go some distance to mitigate the effects of excluding same-sex couples from marriage. But, a domestic partnership regime is unlikely to provide the same degree of symbolic recognition and affirmation of the personal relationship as marriage.

Minimal Impairment

When legislation violates constitutional rights, the second step of the proportionality test requires that the government demonstrate that the impairment is no more than is reasonably necessary to achieve its goals. The exclusion of same-sex couples from the institution of marriage

means that these couples have no way to "opt in" to the rights, responsibilities and status that is immediately accorded to opposite-sex couples who marry. At the moment, prior to the passage of the *Modernization of Benefits and Obligations Act*, the inability to marry means that same-sex couples cannot opt into a range of rights and responsibilities that are available exclusively to married couples. By eliminating most but not all of the distinctions between married and unmarried couples, Bill C-23 will significantly mitigate this unfairness. Same-sex couples who now live together in a conjugal relationship for a period of not less than one year will be able to access many of these rights and responsibilities. But, there are still some significant disparities between opposite-sex couples who have the choice of marrying and opting in to these rights and responsibilities immediately, and same-sex couples who do not have the option of marrying, and are only entitled to these rights and responsibilities after one year of cohabitation. Moreover, there are still several rights and responsibilities from which same-sex couples will remain excluded. As discussed above, the *Immigration Act* will not be amended by the *Modernization of Benefits and Obligations Act*, and same-sex couples cannot sponsor their partners. Opposite-sex couples, on the other hand, have the option of marrying their partners, and are thereby entitled to sponsor their partners for immigration.

As suggested in relation to the rational connection requirement, the government's ability to demonstrate minimal impairment would be significantly improved by the introduction of a domestic partnership regime, whereby same-sex couples would be able to opt in to the same rights and responsibilities as married couples.[363] The constitutionality of the exclusion from marriage would then rest on the status or symbolic arguments alone.

(iv) Conclusion

Our discussion is intended to illustrate the potential vulnerability of the opposite-sex definition of marriage to a constitutional challenge. It is important to emphasize that we are not predicting that the definition will be struck down by the courts – only that there are strong arguments leading in that

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[363] These domestic partnership regimes are discussed *infra*.

direction. There are many other variables – including the political ramifications of a court striking down the opposite-sex definition of marriage – that might well lead the courts to pull their punches. In the current political environment, such a finding would likely further fuel the charges of judicial activism and the attack on the institutional legitimacy of the courts. The courts may well shy away from this political minefield, and defer to the will of the legislature. Further, even if the courts did strike down the opposite-sex definition of marriage, this would not be the end of the story. One scenario that cannot be ruled out is the possibility that the federal government would invoke section 33 of the *Charter* to reassert the opposite-sex definition of marriage. The province of Alberta has made it clear that it is willing to defend the definition of marriage through the use of the notwithstanding clause (despite its dubious constitutional jurisdiction to do so).[364]

Our analysis is intended to illustrate that the opposite-sex definition of marriage is vulnerable to constitutional challenge, but not that the definition will inevitably fall. However, our analysis is also intended to suggest that a government committed to the values of caring, commitment, equality, autonomy and privacy, and to proactively realizing its constitutional obligations, might seriously consider amending the opposite-sex definition of marriage. Amending the definition of marriage would be consistent – for the reasons discussed extensively above - with the promotion of relationships of caring and commitment and with the value of equality. It would also be consistent with the value of autonomy, by giving individuals within same-sex relationships the freedom to choose their relational status. Finally, removing the opposite-sex requirement from the definition of marriage would be consistent with the value of privacy. Marriage has considerable advantages over common law status, in so far as there are no intrusive tests to determine entitlement. Rather, the parties can publicly declare their commitment and thereby be recognized as spouses for the purposes of a range of legal rights and responsibilities. Recognizing same-sex marriage is thus

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[364] A private member's bill passed by the Alberta legislature defines marriage as "a marriage between a man and a woman" and then adds a notwithstanding clause insulating the definition from a challenge based on sections 2 or 7-15 of the *Charter*. Bill 202, *Marriage Amendment Act*, 4th Sess., 24th Leg., Alberta, 2000 (assented to March 23, 2000).

consistent with the normative values that we have suggested ought to guide state regulation of adult personal relationships.

Having said that, the current political environment makes such legislative reform unlikely in the foreseeable future. There have been many clear indications that the considerable political reluctance to extend the existing definition of marriage has not yet abated. Examples include the amendment of Bill C-23 in committee to include an opposite-sex definition of marriage, the Minister's comments on the importance of preserving the existing definition of marriage in her introduction of Bill C-23 to the House of Commons, and the broad support garnered by the Reform Party's motion defending marriage in June 1999.

On the other hand, it may only be a matter of time. In less than ten years, there has been a significant change in social attitudes towards, and legal recognition of, same-sex relationships. The shift in Canadian attitudes reflects a more general normative shift in understandings of marriage and family within many Western countries in the last decade. While only the Netherlands has moved to recognize same-sex marriage, many countries have begun to set up parallel legal regimes that approximate marriage. Same-sex couples are increasingly being given the option of entering into domestic partnership regimes, which accord most of the same rights and responsibilities as marriage. The shift towards the recognition of these relationships is indicative of a broader attitudinal change, in which the legitimacy of same-sex relationships is being accepted and affirmed.

The *Modernization of Benefits and Obligations Act* must be seen within this broader context of changing societal norms and attitudes. If Bill C-23 is enacted, same-sex couples will have legal benefits and obligations in federal legislation identical to those of opposite-sex common law couples. For the moment, marriage remains the last bastion of the "traditional family", and the last stronghold of the constituency committed to defending "traditional family values" from same-sex relationships in what has otherwise become a losing battle. But, as the fall-out of these reforms settles, and the

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The Bill is in pith and substance in relation to the capacity to marry, a matter that falls within federal jurisdiction and outside provincial jurisdiction in relation to the "solemnization of marriage".

recognition of same-sex partners is normalized in both legal and social discourse, the move towards the recognition of same-sex marriage may seem less loaded in the future.

In the interim, a government committed to realizing its constitutional commitments to equality and autonomy in intimate relationships, but reluctant to tackle the opposite-sex definition of marriage in the immediate future, would be well advised to consider the enactment of a domestic partnership regime, discussed in detail in the section that follows. As noted above, the existence of a domestic partnership regime may reduce the vulnerability of the opposite-sex definition of spouse to constitutional challenge. While it may not provide long-term immunity to the definition of marriage, it might well buy a government time.

(b) Unmarried Non-conjugal Cohabitants

It is not at all clear that marriage provides a potential solution to the needs of persons living together in non-conjugal relationships. In our culture, the social meaning of marriage necessarily involves conjugality, although conjugality no longer necessarily involves marriage. This is so even though the law does not expressly exclude persons of the opposite sex from entering a celibate union. The common law does provide that a marriage is voidable in a nullity action if it has not been consummated through an act of sexual intercourse. However a party who has agreed to or acquiesced in a marriage with knowledge of the other party's inability or disinterest in engaging in sexual intercourse is barred from bringing a nullity action. Therefore, opposite-sex cohabitants have always had the option of marrying, whether or not their relationships have a sexual component. It follows that if the definition of marriage were amended to permit same-sex marriage, any two unmarried adults outside the prohibited degrees could choose to marry. However, because marriage is so deeply associated with sexual relations, it is unlikely that any significant numbers of "non-conjugal" cohabitants, currently excluded from federal laws, would seek inclusion through this route. Domestic partnership regimes, discussed in the section that follows, offer considerably more promise for the inclusion of non-conjugal couples than does marriage.

B. Domestic Partnership Regimes

Faced with challenges to the exclusion of same-sex couples from the definition of marriage, and their consequent exclusion from a wide range of legal rights and responsibilities, an increasing number of jurisdictions have enacted, or are considering enacting, registration schemes that establish a civil status parallel to marriage. Such schemes enable partners to formally register their relationships, express their commitment publicly, and voluntarily adhere to some or all of the legal rights and responsibilities conferred on married persons. In contrast to their uniform resistance to even considering the idea of changing the definition of marriage, the possibility of enacting such schemes has attracted increasing attention from Canadian legislators and policy-makers across the political spectrum.[365] The political attraction of domestic partnership regimes lies in their capacity to foster the equality and autonomy of same-sex couples and other domestic partners without altering the traditional definition of marriage that is so deeply rooted in Western cultural and religious traditions.

We will begin our analysis of registered partnerships by briefly describing the schemes that have been enacted or proposed in Canada and in other countries. We will then explain the advantages that a federal partner registration law would add to the current structure of federal regulation of adult personal relationships. Our conclusion is that the enactment of a registered partnership scheme at the federal level will promote the values of caring and commitment, equality, autonomy, privacy and security that ought to guide state policy in relation to adult personal relationships.

1. Models in Other Jurisdictions

(a) Registered Partnership in Europe

In 1989, Denmark became the first country to adopt a registered partnership regime for same-sex couples.[366] To be entitled to register as partners, the two persons must be of the same sex, although they need not share a sexual relationship, or even live together. The wish to provide mutual security is sufficient. At least one of the partners must be a Danish resident and citizen, and both must be over 18 years of age. Persons who are already party to a marriage or registered partnership are not permitted to register.

In most respects, the legal effects of registered partnership are the same as those of marriage respecting, for example, property rules, separation, divorce, maintenance, social security, pensions and inheritance regimes. Terms such as "marriage" and "spouse" occurring in Danish legislation are deemed to include registered partners. The conditions in Danish law relating to separation or divorce apply to registered partnerships.

However, the Danish model does not eliminate discrimination between same-sex partners and married spouses. In the Act as originally passed, registered partners are not permitted to adopt. Nor are they entitled to joint custody of a child or access to assisted conception. Legislation was passed in 1999 making "step-parent" adoption by a same-sex partner possible. A registered partner can now adopt the other partner's child.[367] The prohibition on adoption by registered partners as a couple, however, remains in place. Nor is there a right to apply on relationship break down for an order of joint custody, access or child support. Finally, the legal formation of registered partnerships cannot be carried out in church and registered couples have no claim to mediation performed by

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[365] See, e.g., Rainer Knopf, "The Case for Domestic Partnership Laws", Policy Options, June 1999, 53-6; Jill Mahoney, "Alberta Government Decides to Say No to Same-sex Marriages", *The Globe and Mail* (19 March 1999).

[366] Lov. nr. 372 af 7.6.1989 om registreret partnerskab [Act no.372 of June 7, 1989 on Registered Partnership]. See Nielsen, "Family Rights and the 'Registered Partnership' in Denmark", (1990) 4 Int' J. L. & Fam. 297; Lund-Anderson, "Moving Towards the Individual Principle in Danish Law", (1990) 4 Int'l J. L. & Fam. 328; Pedersen, "Denmark: Homosexual Marriages and New Rules Regarding Separation and Divorce", (1991/92) 30 J. Fam. L. 290; Dupuis, "The Impact of Culture, Society and History on the Legal Process: An Analysis of the Legal Status of Same-sex Relationships in the United States and Denmark", (1995) 9 Int'l J.L. & Fam. 86; Bech, "Report from a Rotten State: 'Marriage and Homosexuality in Denmark", in K. Plummer ed., *Modern Homosexualities: Fragments of Lesbian and Gay Existence* (New York: Routledge, 1992) 134.

[367] Act no.360 of June 2, 1999, section 2.

clergy. For these reasons, as several commentators have argued, registered partnerships are, relative to marriage, "second class forms of relationships".[368]

A number of other Nordic nations have since followed the Denmark model, including Norway (1993),[369] Sweden (1994),[370] Iceland (1996),[371] and the Netherlands (1998).[372] With the exception of the Dutch scheme, the other Nordic registered partnership laws replicate the essential features of the Danish law: assimilation to marital status with some critical exceptions relating to parental status and the religious significance of marriage.[373] The Icelandic law differs from the Danish law in that it allows registered partners to have joint custody of the biological children of one partner. The law in the Netherlands differs from the Danish law in that it is open to opposite-sex and same-sex partners, and all couples may apply to adopt a child. Belgium (1998), France (1999) and the Spanish province of Catalonia (1998) have also enacted registration schemes open to two persons of the opposite or same sex, although the rights and obligations they impose are more limited than the Danish model.[374] In the Czech Republic a bill on registered partnership failed by several votes in 1998;

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[368] Kathleen A. Lahey, *Are We Persons Yet? Law and Sexuality in Canada* (Toronto: University of Toronto Press, 1999) at 328. See also McCarthy and Radbord, "Family Law for Same-Sex Couples: Charter(ing) the Course", (1998) 15 C.J.F.L. 101, 123 ("Separate is not equal. Registered domestic partnerships create a second class category of relationships for those deemed less worthy of recognition. The introduction of registered domestic partnerships prevents access to the fundamental social and cultural institution of marriage in an attempt to privilege heterosexuality.").

[369] Lov. 30. April 1993, *nr.* 40 om registrert partnerskap [Act of April 30, 1993 no.40 on Registered Partnership]. A description of the Act, and an English translation of its text, can be found in Marianne Roth, "The Norwegian Act on Registered Partnership for Homosexual Couples", (1997) 35 J. Fam. Law 467. See also Lodrup, "Registered Partnership in Norway", [1994] International Survey of Family Law 387. Roth reports (at 468) that in the first five months of its operation, 154 couples registered their partnerships.

[370] Lag (1994: 1117) om registrerat partnerskap [Act no.1117 of 1994 on Registered Partnership]. See Saldeen, [1994] International Survey of Family Law 441; Nygh, "Homosexual Partnerships in Sweden", (1997) 11 Australian J. Fam. L. 11.

[371] Law on Registered Cohabitation no.87/1996. See Bjorgrinsson, "General Principles and Recent Developments in Icelandic Family Law", [1995] International Survey of Family Law 225.

[372] Act of July 5, 1997, Staatsblad 1997, 324; Schrama, "Registered Partnership in the Netherlands", (1999) 13 Int'l J.L.P. & Fam. 315.

[373] Lund-Anderson, "Cohabitation and Registered Partnership in Scandinavia: The Legal Position of Homosexuals", in J. Eekelaar and T. Nhlapo eds., *The Changing Family: Family Forms and Family Law* 397 (Oxford: Hart Publishing, 1998).

[374] For a description of the Catalonian *Stable Couples Act*, the Belgian *Statutory Cohabitation Act*, and the French *Pacte Civil de Solidarité* (PACS), see Carolyn Forder, "Models of Domestic Partnership Laws: The Field of Choice", in *Domestic Partnership Conference Papers* (Queen's University, October 1999) at 52-8. Any two unmarried persons who live together can invoke the Belgian scheme. Any two persons outside the prohibited degrees who are not party

plans are underway for an amended proposal.[375] In Hungary, a Constitutional Court decision in 1995 ruled that the exclusion of same-sex couples from laws recognizing unmarried cohabitants was unconstitutional. The cohabitation laws were amended to include same-sex couples in 1996.[376] The implementation of registered partnership schemes is currently under consideration in a number of other European countries, including Germany, Belgium, Luxembourg, Switzerland, Italy, Spain, Portugal, Finland and the Czech Republic.[377]

(b) Hawaii (1997)

Hawaii became the first state in the U.S. to adopt a partner registration scheme with the passage of a "reciprocal beneficiaries" law in 1997.[378] The passage of the Act was part of a series of events in Hawaii precipitated by the 1993 ruling of the Hawaii Supreme Court in *Baehr* v. *Lewin.*[379] The Court ruled that the state's opposite-sex definition of marriage constituted sex discrimination contrary to the equal protection clause of the Hawaii State Constitution. Following the ruling, the legislature established a Commission on Sexual Orientation and the Law that recommended in 1995 that the marriage statute be amended "to allow two people to marry, regardless of their gender."[380] The Commission also recommended that the legislature adopt "a universal comprehensive domestic partnership act that confers all the possible benefits and obligations of marriage for two people,

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to a marriage or another PACS may invoke the French scheme. Forder describes the Belgian and French schemes as "a sort of half-way house between unregulated cohabitation and marriage" (*Ibid.* at 55) that do not achieve equality for same-sex couples (*Ibid.* at 58).

[375] Schrama, *supra* note 372 at 316; Forder, *Ibid.* at 59.

[376] Forder, *Ibid.* at 46-7.

[377] Forder, *Ibid.* at 59; Schrama, *supra* note 372 at 316.

[378] *An Act relating to Unmarried Couples*, 1997 HI H.B. 118. Information about Hawaii's reciprocal beneficiaries' law can be found at < http://mano.icsd.hawaii.gov/doh/records/rbr.htm>. For descriptions of the Act, see Bailey, "Hawaii's Same-sex Marriage Initiatives: Implications for Canada", (1998) 15 Can. J.F.L. 153; Martha Bailey, *Marriage and Marriage-Like Relationships* (Law Commission of Canada, 1999) at 125-7; Chambers and Polikoff, "Family Law and Gay and Lesbian Family Issues in the Twentieth Century", (1999) 33 Family L.Q. 523, 531.

[379] 852 P. 2d 44 (Haw. 1993).

[380] Hawaii, *Report of the Commission on Sexual Orientation and the Law* (Legislative Reference Bureau, Dec. 1995). The full text of the Report is available online at <http://www.state.hi.us/lrb/rpts95/sol/soldoc.html>.

regardless of gender."[381] The legislature rejected the first option, proposing instead a constitutional amendment to restrict marriage to opposite-sex couples. The electorate ratified the marriage amendment by a two-thirds majority in November 1998.[382] The legislature chose instead to implement a limited registration scheme for "reciprocal beneficiaries", one that falls far short of the Commission's recommendation that registrants obtain all the benefits and obligations of marriage.

As noted above, the stated purpose of the reciprocal beneficiaries law is to extend certain rights and benefits to couples who are legally prohibited from marrying because they are of the same sex or within the prohibited degrees of consanguinity.[383] The legislation repeats the legislature's finding that "the people of Hawaii choose to preserve the tradition of marriage as a unique social institution based upon the committed union of one man and one woman."[384] However, the legislature acknowledged that "there are many individuals who have significant personal, emotional, and economic relationships with another individual yet are prohibited by such legal restrictions from marrying."[385] It cited as examples "two individuals who are related to each other, such as a widowed mother and her unmarried son, or two individuals who are of the same gender".[386] Registration as a reciprocal beneficiary is available to two persons who are legally prohibited from marrying, are at least eighteen years old, and are not married nor party to another reciprocal beneficiary relationship.[387] By filing a declaration, reciprocal beneficiaries become subject to a range of rights and obligations specified in Hawaii law, including inheritance rights and survivor benefits, health-related rights such as hospital visitation, family and funeral leave, private and public employee prepaid health insurance coverage, motor vehicle insurance coverage, jointly held

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[381] *Ibid.*

[382] The coming into force of the amendment led the Hawaii Supreme Court to conclude that the opposite sex definition of marriage no longer violated the State Constitution: *Baehr v. Miike*, 994 P.2d 566 (Hawaii Sup. Ct. 1999).

[383] Hawaii Revised Statutes 1999, s.572C-1.

[384] *Ibid.*

[385] *Ibid.*

[386] *Ibid.*, s.572C-2.

[387] *Ibid.*, s.572C-4.

property rights, legal standing for wrongful death and crime victims rights, and other benefits related to the use of state facilities and state properties. The state auditor reported that 435 reciprocal beneficiary relationships were registered in the first year of the law's operation.[388]

The Hawaii "reciprocal beneficiaries" legislation rests on several normative assumptions inconsistent with Canadian understandings of relational equality. One is the view that rights and obligations should not be extended to unmarried opposite-sex couples unless they are legally barred from marrying. Another is the explicit creation of second-class status for same-sex couples and other "reciprocal beneficiaries". The legislation provides that "unless otherwise expressly provided by law, reciprocal beneficiaries shall not have the same rights and obligations under the law that are conferred through marriage."[389] By maintaining a privileged legal status for marriage, the Hawaii legislature has chosen a discriminatory approach that stands in stark contrast to the principle of equal status adopted by the Vermont legislature three years later.

(c) Vermont (2000)

As in Hawaii, the Vermont "civil unions" bill was precipitated by a court ruling declaring the opposite-sex definition of marriage to be contrary to the State Constitution. On December 20, 1999, the Supreme Court of Vermont ruled in *Baker* v. *State* that

> ...the state is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law. Whether this ultimately takes the form of inclusion within marriage laws themselves or a parallel "domestic partnership" system or some equivalent statutory alternative rests with the legislature.[390]

The legislature has chosen to pursue the latter option, that is, the creation of an "equivalent statutory alternative". In April 2000, the House of Representatives and the Senate approved a bill that will enact a new civil union status with legal consequences that run parallel to those of marriage. The

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[388] Hawaii, Auditor, *Study of the Fiscal Impact of Providing Certain Benefits to Reciprocal Beneficiaries*, Report No. 99-17, April 1999; Mike Yuen, "Reciprocal beneficiaries law report says impact minimal", Honolulu Star-Bulletin, 28 April 1999.

[389] Hawaii Revised Statutes, *supra* note 383.

[390] 744 A. 2d 864 at 867 (Vermont S.C., 1999) per Amestoy C.J.

legislative findings reported with the bill set out the reasons for choosing the creation of a new status rather than amending the definition of marriage:

> Changes in the way significant legal relationships are established under the constitution should be approached carefully, combining respect for the community and cultural institutions most affected with a commitment to the constitutional rights involved. Approaching the granting of benefits and privileges to same-sex couples through a system of civil unions will provide due respect for tradition and long-standing social institutions, and will permit adjustment as unanticipated consequences or unmet needs arise.[391]

Like the registered partnership regimes enacted in the Nordic European countries, parties to a civil union would have to be of the same sex, at least 18 years of age, not be party to another civil union or marriage, and not be related to each other (s.1202-3, s.5163). Civil unions would be certified according to the same procedures as civil marriage, and could be dissolved following "the same procedures" and "subject to the same substantive rights and obligations that are involved in the dissolution of marriage in accordance with" the divorce laws of the state.[392]

In contrast to the European and Hawaii laws, the Vermont bill reflects a stronger commitment to conferring equivalent legal rights and obligations on same-sex partners. The bill provides that parties to a civil union would have all the same rights and obligations of married couples pursuant to Vermont law (s.1204). The legislature took care to reduce the risk that the creation of a status "separate but equal" to marriage might be interpreted by the courts as conferring unequal rights and obligations on parties to a civil union. The bill adds an interpretive provision directing the courts to confer the same rights and obligations on parties to a civil union as are conferred on parties to a marriage. The only exception is

> ...when clearly necessary because the gender-based text of a statute, rule or judicial precedent would otherwise produce an unjust, unwarranted, or confusing result, and different treatment would promote or enhance, and would not diminish, the common benefits and protections that flow from marriage under Vermont law.[393]

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[391] The full text of the Bill is available online at <http://www.leg.state.vt.us/baker/baker.cfm>.

[392] *Ibid.*

[393] *Ibid.*, s. 36.

The Vermont "civil unions" law is the first registered partnership statute in the world to eliminate all differences in the legal rights and obligations of married and same-sex couples. Its emergence from the legislative process with the principle of equal status intact thus represents a breakthrough in the protection of the equal rights of gay and lesbian couples.

The Vermont "civil unions" law does share with all other registered partnership legislation a preoccupation with preserving the traditional definition of marriage, and thus falls short of a full commitment to equality. While other registered partnership schemes are separate and unequal, the Vermont law creates a status that is separate yet truly equal. Because marriage has cultural, symbolic importance that transcends the legal consequences attached to it, a full commitment to the value of equality requires the removal of the opposite-sex requirement from the definition of marriage as well.

(d) Canadian Proposals

Canadian governments have not yet enacted a registration scheme for domestic partners, although several are considering doing so, and several reports have recommended their adoption.

(e) Ontario Law Reform Commission (1993)[394]

The OLRC recommended the establishment of a registered domestic partnership scheme that would be open to any two individuals regardless of the nature of their relationship[395] so long as they were 18 years of age and not party to another marriage or domestic partnership.[396] Partners would be subject to the same rights and responsibilities as married couples pursuant to the *Family Law Act* (these include rights and obligations in relation to property division, spousal support, cohabitation contracts, and the family members' tort claim). The Commission defended its

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[394] Ontario Law Reform Commission, *Report on the Rights and Responsibilities of Cohabitants under the Family Law Act* (1993). For commentary and critique, see Boyd, "Expanding the 'Family' in Family Law: Recent Ontario Proposals on Same Sex Relationships", (1994) 7 C.J.F.L. 545.

[395] *Ibid.* at 53.

[396] *Ibid.* at 54-5.

recommendation by reference to the values of equality, autonomy and privacy,[397] and noted that the creation of a new civil status preserves the "particular cultural and religious significance of marriage".[398] Registered partnerships could be revoked unilaterally with notice to the other partner.[399]

(f) British Columbia Law Institute (1998)

In its *Report on Recognition of Spousal and Family Status*, the BCLI recommended that the provincial government enact a *Domestic Partner Act*.[400] The proposed Act would enable any two persons over the age of majority (nineteen) to agree to have rights and obligations equivalent to those of married spouses by making a formal declaration. The Report recommends that domestic partners be added to definitions of spouse and related terms in all British Columbia legislation. Partnership status would be open to conjugal and non-conjugal couples, whether or not they are living together. The Report noted that "[j]ust as with marriage, it would be theoretically possible, although highly unlikely, that people making a domestic partner declaration would not live together."[401] Partners must not be party to another domestic partnership or marriage (unless, in the latter case, they have been separated for more than one year and the separation is intended to be permanent). The partnership could be terminated by a separation agreement or by living separate and apart for more than one year with the intention that the separation be permanent.[402]

Like the Ontario Law Reform Commission, the BCLI defended its recommendations by reference to principles of autonomy, privacy and non-discrimination.[403] To protect the principle of

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[397] *Ibid.* at 53-6.

[398] *Ibid.* at 54.

[399] *Ibid.* at 54-5.

[400] British Columbia Law Institute, *Report on Recognition of Spousal and Family Status* (Vancouver: British Columbia Law Insitute, 1998) at 11-12. The Report is available online at <http://www.lawreform.gov.bc.ca>. See also Thomas Anderson, "Comment on the *Report of the British Columbia Law Institute on Recognition of Spousal and Family Status*", in *Domestic Partnership Conference Papers* 87 (Queen's University, 1999).

[401] *Ibid.* at 12.

[402] *Ibid.* at 96.

[403] *Ibid.* at 5-8.

privacy, partners would have the option of not registering their partnership declaration, in which case it would still have legal significance as between them during their lives, but limited significance as against third parties.[404]

2. The Current Federal Legislative Context

The definition of common law partners included in nearly the full range of federal statutes after Bill C-23 requires cohabitation in a conjugal relationship for one year. It could be argued that this short period of cohabitation has made it unnecessary to consider enacting a domestic partnership scheme at the federal level, since cohabiting conjugal couples will be included in all federal statutes after a relatively short period of cohabitation. In the jurisdictions described above that have adopted or are considering adopting registered partnership schemes, same-sex couples do not have the extensive package of rights and obligations that exist in federal legislation after Bill C-23.

It is true that the need for a domestic partnership scheme at the federal level is less pressing after the enactment of Bill C-23. Nevertheless, when one compares the operation and scope of the common law partner definitions with the potential scope and operation of a domestic partnership scheme, it is clear that the latter continues to offer a number of advantages.

First, a domestic partnership law would promote the equality and autonomy of non-conjugal cohabitants by permitting them to choose to subscribe to the package of spousal and partnership benefits from which they are currently excluded. The only other means of effectively accommodating the interests of non-conjugal cohabitants is by ascribing legal consequences to their relationships by enacting legislative definitions that would capture a broader range of economically and emotionally interdependent adult relationships, an option we discuss in greater detail below. Given the diversity of non-conjugal relationships, and our lack of knowledge regarding their needs and expectations, it is likely that governments will continue to exercise caution before ascribing legal consequences to

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[404] *Ibid.* at 95.

them. Precisely because registration as domestic partners would be based on a mutual, voluntary decision to assume legal consequences, it avoids many of the difficulties and uncertainties of ascribed legal status.

Second, the possibility of registering as domestic partners would be a welcome option even for those unmarried couples living together in conjugal relationships. Once they have lived together for one year, these couples are now automatically included in the definition of common law partners in nearly the full range of federal statutes that apply to married couples. Nevertheless, a registration option would enhance these couples' autonomy and privacy, permit them to express their commitment publicly, and would promote the protection of their reasonable expectations.

One of the disadvantages of common law partner status is that it is imposed involuntarily, without any formal declaration of commitment apart from the fact of living together. The ability to formalize a relationship through a public declaration of commitment should not be underestimated. It gives the partners and their relationship a degree of public visibility, acceptance and accountability that is simply lacking with common law partnership status. There are innumerable ongoing events in one's community – from small, day to day acts of recognition to the celebration of anniversaries – that continually reaffirm community acceptance and support of formalized unions. Registration schemes are thus preferable to ascribed relational status in promoting caring commitments in domestic relationships.

Moreover, the definition of common law partnerships is not self-executing. It involves interpretation by legal decision-makers regarding the duration of cohabitation and the presence or absence of a conjugal relationship. These aspects of the definition of common law partners will give rise to potential uncertainties and intrusive inquiries into partners' lives as part of the administration of federal legislative schemes, just as definitions of common law spouses have in the provincial context.[405]

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[405] See Gavigan, "Legal Forms, Family Forms, Gendered Norms: What is a Spouse?", (1999) 14 C.J.L.S. 127; Cossman and Ryder *Gay, Lesbian and Unmarried Couples and the Family Law Act: Accommodating a Diversity of Family*

Registered partnership status, in contrast, comes into effect immediately and voluntarily at a time consciously chosen by the partners themselves. There is no uncertainty about their legal status and no need for invasions of privacy to determine whether or not partners fall within relational definitions employed in statutes. These attributes of registered partnerships promote the value of equality because they confer on partners all of the same advantages that marriage provides to opposite-sex couples. They also promote autonomy and security to a greater degree than common law partnership status does. A registered partnership scheme enables partners to choose to take on a more secure set of legal rights and obligations that correspond to the aspirations and reasonable expectations of registering partners.[406]

For these reasons, the federal government should enact a registered domestic partnership scheme that would be open to any two people who are at least 18 and who are not married or party to another registered partnership. Registered domestic partners should be added to all federal statutes alongside married spouses and common law partners. The registration of a domestic partnership will signal the partners' commitment to each other and immediately subject them to rights and obligations under federal law. There should be no difference in the legal status of married couples and registered domestic partners. The equality principle embodied in the Vermont Bill should be preferred over the discriminatory elements of the European laws and the Hawaiian reciprocal beneficiaries law. The prohibitions on marital status and sexual orientation discrimination in s.15 of the *Charter* would render any differences in treatment unconstitutional since there could not be said to be any relevant differences in the qualitative nature of partnership relationships and marital relationships.

Forms (Ontario Law Reform Commission, 1993) at 80 ("The requirement of a 'conjugal' relationship involves an unnecessary and distasteful inquiry into the intimate details of the partners' lives, including their social and sexual habits."). See discussion infra at note 429.

[406] For a similar description of the advantages of registered partnerships, see Thomas Anderson, "Comment on the Report of the BCLI on Recognition of Spousal and Family Status", *Domestic Partnerships Conference Papers* (Queen's University, 1999), at 96.

Because of the limits on federal jurisdiction, the implementation of a registered partner status for the purposes of federal laws could have no direct or immediate impact on provincial laws. Registered partners would remain unrecognized (except as common law spouses if they meet the cohabitation and conjugal requirements) in provincial laws dealing with the rights and responsibilities of family members until those laws are also amended to accommodate the new civil status. The lack of correspondence between federal and provincial relational definitions would be an unfortunate and inconvenient situation. The best situation would be for federal and provincial governments to move forward in a coordinated fashion. However, in the absence of federal/provincial agreement, the advantages of federal leadership on this issue outweigh the disadvantages of a lack of correspondence between federal and provincial relational definitions. The same problems exist now for persons recognized as common law partners in federal legislation. For example, same-sex couples, included in the definition of common law partners in federal statutes, are not recognized in the legislation of seven provinces. But just as this difficulty did not prevent the government from moving ahead with Bill C-23, neither should the challenges of divided jurisdiction inhibit the federal government from establishing a registered partnership scheme.

There is no compelling reason to limit registered partnerships to same-sex couples, conjugal couples, or even to cohabiting couples. The value of autonomy suggests that the choice of relational status should only be limited for good reasons. The experience in the Netherlands indicates that a significant number of opposite-sex couples have chosen to register as partners rather than marry,[407] and that 62% of registered same-sex couples would prefer to marry if that option were open to them.[408] It should not surprise us that the meanings that particular couples attach to the institutions of marriage and domestic partnership are personal and variable. Marriage has deep historical and

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[407] Martha Bailey reports that during the first ten months of the operation of the new law about one third of the total of 3,996 registrants were opposite sex couples: Bailey, "Private International Law Issues Relating to Registered Partnerships: A Canadian Perspective", in *Domestic Partnership Conference Papers* (Queen's University, 1999) at 276. See also Forder, "Models of Domestic Partnership Laws: The Field of Choice", *supra* note 374 at 61-2.

religious roots; domestic partnership is a product of the secular aspirations of contemporary liberal democracies. Ideally, individuals seeking to formalize their primary adult personal relationships should be free to choose the relational status that carries the combination of meanings and legal consequences that provides the best fit with their own beliefs, attitudes and aspirations. Moreover, the principle of equality leans against the creation of a new legal status defined by reference to a prohibited ground of discrimination.

The enactment of a federal domestic partnership law would do much to advance the values of caring and commitment, equality, autonomy, privacy and security that ought to guide state regulation of adult personal relationships. Registering couples would be able to publicly declare their commitment, formalize their relationships, and freely assume the package of legal rights and obligations that are currently extended to husbands, wives and common law partners. However, a domestic partner registration scheme does not provide a complete answer to the needs of persons living together in relationships of care and commitment. For a variety of reasons, just as many cohabiting opposite-sex couples are not married, a number of persons living together in relationships of caring and commitment will not register as domestic partners. Even if privacy protections are built into the new law along the lines of the BCLI recommendations, some couples will be reluctant to choose a greater degree of public disclosure of their relationships than required by the definition of common law partners. Further, as McCarthy and Radbord have argued, "a comprehensive registered domestic partnership regime, without default protections in the event of a failure to register, offers no recourse to vulnerable spouses who did not have sufficient knowledge or power in a relationship to protect their interests by registration."[409] In other words, registered

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[408] See Netherlands Ministry of Justice, Scientific research and documentation centre, *Registered Partnerships in the Netherlands: A Quick Scan* (1999), at 22, quoted in Bala, "Alternatives for Extending Spousal Status in Canada", at note 4 (draft of November 1999, submitted to the Can. J. Fam. L.).

[409] McCarthy and Radbord, *supra* note 368 at 123. See also Cossman and Ryder, *supra* note 405 at 56; Ontario Law Reform Commission, *Report on the Rights and Responsibilities of Cohabitants under the Family Law Act* (1993) at 56; Ryder, "Becoming Spouses: The Rights of Lesbian and Gay Couples", in Law Society of Upper Canada, *Special Lectures 1993 – Family Law: Roles, Fairness and Equality* 399 (Toronto: Carswell, 1993) at 440 ("The relationships of many persons, gay or straight, evolve gradually into emotionally and economically interdependent partnerships, often

partnership schemes are "under-inclusive" in not meeting the needs of all persons living in relationships of caring and commitment. Therefore, to fully promote the values of equality and security in the regulation of adult domestic relationships characterized by caring and commitment, the state must consider ascribing or imposing legal status on persons living with others outside marriage or a registered partnership. At the same time, careful consideration must be given to not interfere unduly with the privacy or autonomy of unmarried and unregistered couples. With the passage of the *Modernization of Benefits and Obligations Act*, the federal government will add common law partners to the vast majority of federal statutes. Thus, a "default scheme" will already be in place for unmarried or unregistered conjugal couples. In the next section, we will consider the adequacy of the current definition of common law partner and related terms in federal statutes, and advance the argument that the government should consider including non-conjugal domestic relationships involving care and commitment in federal legislation to a greater extent.

C. Deemed or Ascribed Spousal/Relational Status

1. Ascribed Spousal/Partner Status

(a) Current Definitions

At the moment, prior to the expected passage of the *Modernization of Benefits and Obligations Act*, federal pension and tax laws include deemed or ascribed spousal status provisions. These definitions generally have residency, duration and conjugality requirements. For example, the *Old Age Security Act* defines spouse as including "a person of the opposite sex who is living with that person, having lived with that person for at least one year, if the two persons have publicly

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without much thought to the legal consequences or on the expectation that the law will impose an equitable resolution of their affairs on the break down of the relationship.").

represented themselves as husband and wife".[410] Similarly, the *Pension Benefits Standards Act* defines spouse as including "a person of the opposite sex who is cohabiting with the member/former member in a conjugal relationship...having so cohabited with the member/former member for at least one year".[411] The duration of residence required in federal definitions of common law cohabitants has steadily decreased over time, and has now settled on a uniform requirement of a year in duration.[412] The definition of spouse is also restricted to opposite-sex couples.

Bill C-23 will replace these definitions of ascribed spousal status with one uniform definition. According to the approach in the Bill, a person cohabiting with another in a conjugal relationship for at least a year will be referred to as a "common law partner". Most significantly, the new definition eliminates the opposite-sex restriction, thereby extending ascribed "partnership" status to same-sex couples. The definition retains the co-residency requirement and the uniform duration for this residency of one year. The definition also retains the conjugality requirement, although it does not define the meaning of "conjugal". Therefore, the definition of conjugality continues to be governed by the case law. Apart from the removal of the opposite-sex requirement, the definition of common law partner is identical to the definition of common law spouse previously employed in federal pension and tax laws.

Several approaches to the interpretation of cohabitation and conjugality are found in the case law. One approach emphasizes the economic relationship between the parties, and examines whether there is a relationship of economic dependency.[413] A second, and more prevalent approach

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[410] Section 2, *Old Age Security Act*.

[411] Section 2(1) *Pension Benefits Standards Act*.

[412] See Appendix A for a detailed examination of how the definition of common law spouses employed in federal legislation have evolved over time.

[413] See *Stolkiewicz v. Filas* (1978) 7 R.F.L. (2d) 366 (Ont. U.F.Ct) at 369-370 which held that "unmarried persons cannot be found to be cohabiting...unless it can be determined that their relationship is such that they have each assumed an obligation to support and provide for the other in the same manner that married spouses are obliged to do". This approach has been the subject of considerable criticism. In *Armstrong v. Thompson* (1979) 23 O.R. (2d) 421 (S.Ct.), the Court stated at 423: " To say that because the dependant spouse worked outside the home, maintained her own bank account, and spent her own money, is reason to deny the rights [to spousal support] is not, in my view, what is contemplated by the Act. This suggestion is an overextension of the peculiar facts set out in Re: Stolkiewicz."

considers whether the relationship is functionally equivalent to marriage. In *Re Feehan and Attwells*, an Ontario County Court held that "cohabit" means "living together in a marriage like relationship outside marriage",[414] an approach that was subsequently affirmed by the Ontario Court of Appeal in *Sanderson v. Russell*.[415] This approach has required the courts to identify the basic dimensions and functions of a marital relationship, and then determine whether the relationship in question sufficiently approximates a marital relationship. In this approach, the economic relationship between the parties is seen as one among a number of factors to be considered, including shelter, sexual and personal relationships, domestic services, social activities, and children.[416]

Both of these approaches to cohabitation and conjugality have been the subject of criticism. As we have argued elsewhere, the economic dependency approach is based on the stereotype of marriage as a relationship of inequality and dependency. [417] This approach to cohabitation, which defines the spousal relationship in terms of the economic dependency of women, seems to be at odds with the partnership model of spousal relationships that increasingly informs family law. While the economic relationship is an important dimension of the relationship, the emphasis should be placed on interdependency and equality, rather than dependency.[418] It is, however, possible to shift the conceptualization of this model slightly, from an economic dependency model to an economic interdependency model. In many respects, the emphasis on economic dependency simply reflected the discourse of spousal support at the time. Moreover, the Court in *Stoikiewicz* did speak of mutual

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[414] (1979) 24 O.R. (2d) 248 (Co.Ct.).

[415] (1979) 24 O.R. (2d) 429 (C.A.). See also *Jansen v. Montgomery* (1983) 30 R.F.L.(2d) 332 (N.S.Co.Ct.), and *Aktary v. Dobroslavic* (1983) 48 B.C.L.R. 26 at 34 (S.C.).

[416] *Molodowich v. Penttinen* (1980), 17 R.F.L.(2d) 376. A similar approach was adopted by the British Columbia Court of Appeal in *Gostlin v. Kergin* (1986) 1 R.F.L. (3d) 448. Lambert J.A., held that a man and a woman should only be considered to be spouses if that they voluntarily assumed mutual obligations. He set out a series of questions to ascertain whether this was the case at 453: "Did the couple refer to themselves, when talking to their friends, as husband and wife, or as spouses, or in some equivalent way that recognized a long-term commitment? Did they share the legal rights to their living accommodation? Did they share property? Did they share their vacations? In short, did they share their lives? And, perhaps most important of all, did one of them surrender financial independence and become economically dependent on the other, in accordance with a mutual agreement?" This approach examines a range of functional dimensions of the relationship, but continues to place primary importance on the existence of economic dependency.

[417] B. Cossman and B. Ryder supra note 405 at 80.

obligations (i.e. whether the individuals in question "have each assumed an obligation to support and provide for the other in the same manner that married spouses are obliged to do").[419] The model could without difficulty be updated to reflect post-*Moge* understandings of spousal support and family obligations more generally, with its emphasis on economic interdependency. Within such a reconceptualized economic *interdependency* model, the main factor for determining the existence of a spousal relationship would be economic – did they live in a relationship of economic interdependency or economic partnership? The limitation of this approach is, however, that it still risks placing too much emphasis on the economic relationship to the exclusion of other factors that contribute to a spousal relationship.

The functional approach – which does take into account a broader range of factors that contribute to a spousal relationship - has also been criticized, primarily for the extent to which it measures all relationships against a norm of an idealized marital relationship.[420] This approach runs the risk of assuming that there is a single model of marriage. As we have argued, "the idealized functional approach sets up a monolithic and mythical image of the marital relationship, against which all relationships are evaluated".[421] Further, reliance on a functional approach may also lead courts "to engage in inquiries into the intimate details of relationships, intruding on personal privacy".[422] At the same time, it is not at all clear that it is possible to avoid a functional definition of spouse, if spousal status is ever to be ascribed by statute. There needs to be some basis on which to distinguish between those relationships to be included within the legislation, and those that are not. It is, after all, the functional similarities of the relationships that has led to the steady expansion of rights and responsibilities to cohabiting couples. A functional approach might identify the different

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[418] *Ibid.*

[419] *Stoikiewicz, supra* note 413 at 370.

[420] Ontario Law Reform Commission, *Report on the Rights and Responsibilities of Cohabitants*, supra note 409 at 62.

[421] Cossman and Ryder, *supra* note 405 at 78.

[422] OLRC, *supra* note 409 at 62.

dimensions and functions of family life, without insisting that all relationships fit perfectly within this norm.

In *M. v. H.*, the Supreme Court of Canada endorsed, with little consideration, the functional approach to conjugality. In particular, Cory J. described the approach in the 1980 Ontario District Court case of *Molodowich* v. *Penttinen* as setting out "the generally accepted characteristics of a conjugal relationship.[423] They include shared shelter, sexual and personal behavior, services, social activities, economic support and children, as well as the societal perception of the couple".[424] The Supreme Court seemed to be taking into account the criticisms of this functional approach to the family, in noting that these dimensions of family life will be present in varying degrees, and that it will not be necessary for a couple to satisfy all of these dimensions for their relationship to be conjugal. "In order to come within the definition, neither opposite-sex couples nor same-sex couples are required to fit precisely the traditional marital model to demonstrate that the relationship is 'conjugal'".[425] The Supreme Court noted that an opposite-sex couple might be considered "to be in a conjugal relationship although they do not have children nor sexual relations".[426]

> [T]he weight to be accorded the various elements or factors to be considered in determining whether an opposite-sex couple is in a conjugal relationship will vary widely and almost infinitely. The same must hold true of same-sex couples.[427]

The Court held that the approach to determining whether a relationship is conjugal must be "flexible", since the "relationships of all couples will vary widely."[428]

(b) Critique of Current Definitions

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[423] Although *M. v. H.*, like *Molodowich v. Penttinen* (1980), 17 R.F.L.(2d) 376, involved the definition of spouse under section 29 of the Ontario *Family Law Act*, it is the only case in which the Supreme Court has commented on the meaning of conjugality.

[424] *M. v. H.*, *supra* note 79 at para 59, citing *Molodowich*, *supra* note 423.

[425] *Ibid.*

[426] *Ibid.* at para 60. See also *Richardson* v. *Richardson*, [1990] N.B.J. No. 423 (C.A.) ("The parties may, for a number of reasons, such as age, illness or indifference, choose not to have sexual relations but still live together and hold themselves out to be husband and wife in other respects. For that reason, it is my view that the trial judge was wrong to have made sexual relations between the parties a requisite for a conjugal relationship.).

[427] *Ibid.*

There are then a number of criticisms that may continue to be directed to the current definitions for ascribed spousal status. First and foremost is the lack of clarity in the prevailing definition of cohabitation and conjugality. Following *M. v. H.*, the test for conjugality involves a consideration of the various factors in *Molodowich*, which according to the Court, "may vary widely and almost infinitely".[429] The Supreme Court has given very little guidance on the question of what, if anything, makes a spousal relationship unique. How many of the factors must a couple meet before they are considered spouses? Are any factors more important than others? The Court gives little guidance, other than to emphasize flexibility and diversity. Indeed, it has said that a conjugal relationship may exist, even in the absence of a sexual relationship, which is often assumed in ordinary parlance to be a central if not defining feature of a "conjugal relationship".

There is good reason not to give primacy to the existence of a sexual relationship in determining entitlement to a range of rights and responsibilities. Making sexual behaviour part of the definition inevitably entails serious invasions of privacy. Moreover, the presence or absence of a sexual relationship is in itself not relevant to any legitimate state objectives. Sex is a poor indicator of a couple's entitlement to the range of federal rights and responsibilities. It is both over- and under-inclusive. Many couples who have a sexual relationship do not have a close economic relationship. And conversely, many couples who do not have a sexual relationship may have an economically and emotionally interdependent relationship. However, once the existence of a sexual relationship is no longer a factor that distinguishes between conjugal and non-conjugal relationships, the exclusion of many non-conjugal couples becomes more and more difficult to sustain.

In the aftermath of *M. v. H.*, there is little clarity to the meaning of conjugality. The Court's approach, while an improvement over a functional approach that holds fast to the idealized norm of marriage, sacrifices clarity and predictability for flexibility and diversity. The approach to conjugality now appears to be an "I know it when I see it" approach. And in extending conjugality to

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[429] *Ibid.*

relationships that do not involve a sexual relationship, the definition of spouse begins to undermine the very distinction between conjugal and non-conjugal relationships. While the definition of spouse does not specifically contemplate the inclusion of relationships between adult siblings, or adult children and their parents, it becomes harder and harder to justify the exclusion of these relationships. These relationships may be characterized by joint residence, emotional intimacy, and economic interdependency. One may provide domestic services for the other. One may be entirely economically dependent on the other. While they would not hold themselves out as spouses, their relationships may be characterized by many of the dimensions of family life that give rise to legal rights and responsibilities.

A related concern is that the definition of conjugality is not self-executing. As mentioned above, it requires interpretation by legal decision-makers. Administration of the definition may require a detailed and intrusive investigation into the lives of the individuals involved. The functional definition of conjugality after *M.* v. *H.* still requires that a decision-maker consider the most intimate details of people's lives, including their sexual and emotional relationships. Such an inquiry constitutes a significant invasion of privacy. One might argue that individuals seeking government benefits must be prepared to compromise their privacy. However, the same invasive procedures are used to impose government obligations. In other words, it is not simply a question of choosing to subject one's self and one's relationship to scrutiny in exchange for potential benefits. Often, it is not a matter of individual choice at all.

(c) Towards a new Definition for Ascribed Status

The current definition of ascribed spousal status lacks clarity, is still under-inclusive of the range of relationships that might warrant protection, and is potentially unduly intrusive of individual privacy. One option would be to attempt to introduce a new definition of cohabitation or conjugality. While the test would have to retain a functional component, it may be possible to better capture the

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[429] *Ibid.*

particular dimensions of personal relationships that give rise to the need for legal recognition, and the allocation of legal rights and responsibilities. In our view, there are two factors that are particularly salient: economic interdependence and emotional intimacy. As we have argued elsewhere:

> It is the combination of emotional intimacy and economic partnership that creates the unique vulnerability of spouses to harsh consequences arising on the break down of a lasting relationship. Emotional intimacy is founded on the kinds of trust that tend to prevent people from taking seriously the possibility of economic deprivation if the relationship falters. And a high degree of economic interdependence potentially creates a high degree of economic vulnerability.[430]

In our study on the spousal definitions in Ontario family law, we previously recommended that the definition of cohabitation for the purposes of ascribed spousal status be amended. We recommended that "spouse" include "either of two persons who have lived together in a relationship of primary importance in each other's lives." We further recommended that "live together" be defined as "living together in an economic partnership whether within or outside of marriage".[431] The Ontario Law Reform Commission was of the view that this definition was problematic. "First, the meaning of the term 'economic partnership' is unclear. Individuals may have difficulty demonstrating to a court that such a partnership existed. Second, even when modified by the phrase 'in a relationship…of primary importance in each other's lives" the proposed definition potentially applies to many relationships that are not currently within the purview of the *Family Law Act*. It could conceivably apply, for example, to business partnerships, as well as to relationships between parents and their children, or between friends."[432]

We continue to believe that the general approach of focusing on emotional intimacy and economic interdependency has much to commend it. First, we do not believe that proving the existence of a economic partnership, or a relationship of economic interdependence is any more difficult to establish than the interrogation of an economic relationship in the current approach to

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[430] Cossman and Ryder, *supra* note 405, at 82.

[431] *Ibid.* at 83.

[432] OLRC Report, *supra* note 409 at 62.

conjugality. The test in *Molodowich* involves an examination of the financial relationship between the parties regarding the necessities of life, the arrangements concerning the acquisition and ownership of property, and any special financial arrangements agreed to between the parties. It also involves an examination of any domestic services provided by one of the parties. These are in any case the kind of factors that go towards the existence of a relationship of economic partnership or economic interdependency.

However, there is merit to the OLRC's concern that the definition will apply beyond traditional "conjugal" couples. We do not agree that the definition would apply to business partnerships. However, a focus on emotional intimacy and economic interdependency could well include a broad range of adult relationships within its purview. It could include the relationship between two elderly sisters who have lived together for 20 years, or the relationship between a parent and adult child who have lived together for many years. Adult siblings or parent/child relationships certainly seem to fall outside of the scope of a definition of 'spouse'. However, the potentially broad scope of the definition may go more to the fact that the distinction between conjugal and non-conjugal relationships is increasingly difficult to sustain. The purpose of expanded definitions of spouses was to recognize relationships that are functionally equivalent to marriage – and thereby characterized by the same degree of emotional and economic interdependence. While the existence of a sexual relationship was one of the factors that continued to characterize the uniqueness of conjugal relationships in the functional approach under *Molodowich*, the Supreme Court has now made it clear that the test for conjugality no longer requires a sexual relationship. As we have argued, in the aftermath of *M. v. H.*, the very distinction between conjugality and non-conjugality has in fact begun to come undone within the test itself.

A question, then, that needs to be addressed is whether it is possible and/or desirable to provide a revised definition of spouse and/or cohabitation that would maintain the distinction between conjugal and non-conjugal couples. If so, then the question of the legal recognition of non-conjugal relationships would proceed as a separate issue. If not, then it would be necessary to

develop a broader term for the ascription of relationship status that applied to conjugal and non-conjugal couples alike. After considering this issue, we will then return to the more specific question of the appropriate definitions to apply to these relationships.

Models in Other Jurisdictions

At least two other jurisdictions have seriously considered this question of ascribed relational status, and the distinctions between conjugal and non-conjugal relationships. We briefly review these two models.

New South Wales

In New South Wales, the *Property (Relationships) Legislation Amendment Act 1999* introduced a detailed definition of de facto relationships, as well as a definition of close personal relationships and domestic relationships.[433] The Act amends the definitions contained in the *De Facto Relationships Act* 1984. It further extends the rights and responsibilities in a range of statutes to de facto relationships , and in some circumstances, to close personal relationships. Section 5 of the Act defines domestic relationships as "a de facto relationship or a close personal relationship (other than marriage or a de facto relationship) between two adult persons, whether or not related by family, who are living together, one or each of whom provides the other with domestic services and personal care." [434] Section 4(1) of the *Act* defines a *de facto* relationship as "a relationship between two adult persons (a) who live together as a couple, and who are not married to one another or related by family." Section 4(2) states that:

> ...in determining whether two persons are in a de facto relationship, all the circumstances of the relationship are to be taken into account, including such of the following matters as may be relevant in a particular case:
>
> (a) the duration of the relationship

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[433] *Property (Relationships) Legislation Amendment Act* 1999 No 4.

[434] Schedule 1, Section 5(2) of the Act provides that " a close personal relationship is taken not to exist between two persons where one of them provides the other with domestic support and personal care: (a) for a fee or reward, or (b) on behalf of another person or an organisation."

(b) the nature and extent of common residence
(c) whether or not a sexual relationship exists
(d) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties
(e) the ownership, use and acquisition of property
(f) the degree of mutual commitment to a shared life
(g) the care and support of children
(h) the performance of household duties
(i) the reputation and public aspects of the relationships.

Section 4(3) specifically provides that "no finding in respect of any of the matters mentioned in subsection 2(a)-(i), or in respect of any combination of them, is to be regarded as necessary for the existence of a de facto relationship, and a court determining whether such a relationship exists is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case."

The Act thus maintains a distinction between de facto relationships and close personal relationships, although both are included within the broader idea of domestic relationships. A *de facto* relationship can be seen as the equivalent of an ascribed spousal definition – it applies to unmarried couples who are living together in a common law or conjugal relationship, although it carefully avoids this language. The Act provides a functional definition of de facto relationships – setting out the kinds of factors that the courts should take into account in determining the existence of such relationships. At the same time, the Act is attentive to the problems of an idealized approach, insisting that a relationship need not meet all of these factors, nor indeed any specific factor, in order to be regarded as a de facto relationship. The definition of de facto relationship bears some resemblance to the Canadian definition of 'conjugal' relationships in the aftermath of *M. v. H.* – a flexible and functional approach that considers residence, sexual, economic, parenting, domestic, and social relationships. But, the New South Wales legislation has the advantage of avoiding the baggage of the language of "conjugality", and its seemingly inescapable association with sexual relationships.

A close personal relationship, on the other hand, applies to individuals who live together in 'non-conjugal' relationships (again, carefully avoiding this language). It is not the marriage-like nature of the relationship that is significant, but rather, whether the relationship involves "domestic support and personal care". The definition is functional, in so far as it is concerned with particular features of the relationship, but it potentially includes a much broader group of individuals, such as parent/adult child, adult siblings, as well as two unrelated adults who live together. Individuals in a "close personal relationship" are considered to be living in a domestic relationship, and have a range of rights and responsibilities, although a much more limited set of rights and responsibilities than those imposed on de facto relationships.

British Columbia Law Institute (1998)

In its *Report on Recognition of Spousal and Family Status*, the BCLI recommended that the provincial government enact a *Family Status Recognition Act*, which would define family relationships.[435] The Report considered the extent to which the law does and should recognize non-traditional spousal relationships and non-traditional family relationships. In terms of spousal relationships, the Report recommended that three kinds of relationships involving spouses or partners be recognized: married spouses, domestic partners [436] and "people in marriage like relationships".[437] The BCLI recommended that the three different spousal relationships consist of the same rights and obligations while the relationship is subsisting. However, it recommended some distinctions in rights and responsibilities between these different relationships when the relationship ends, that is, on separation or death. [438]

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[435] BCLI, *Report on Recognition of Spousal and Family Status*, *supra* note 400.

[436] The BCLI recommendations in relation to domestic partners is discussed supra at note 400-404.

[437] British Columbia Law Institute, draft *Family Status Recognition Act*, section 1, supra note 400.

[438] People in marriage like relationships would not be treated the same as spouses who have voluntarily assumed spousal status (i.e. through marriage and domestic partnership). They would have the right to apply for support, a right to apply for a share of property under the draft *Family Relations Act* (but no automatic right to property); and a right to apply for a share of the estate under the Wills Variation Act (but no automatic right).

The Report specifically recommended that the term "marriage-like relationship" include same-sex couples[439]; that it not require sexual intimacy;[440] and that it not require a duration test[441], except in specially defined circumstances.[442] The draft Act provides a list of relevant factors to take into account in determining whether a "marriage like relationship exists between people who are not married", including "the duration of the relationship, the nature of the relationship, the extent to which the financial interests of the parties have been merged, the extent to which direct and indirect contributions have been made by either party to the other or the mutual well-being of the parties, the extent to which the parties are socially and emotionally interdependent, whether the parties hold each other out as partners, and whether the parties have together taken responsibility for raising children".[443]

In terms of family relationships, the Report recommended that the law should "recognize people (including non-relatives) who live with another in a close relationship that is the equivalent of a family relationship." Family is defined broadly to include "a person's spouse and household member". A "household member" means "a relative or non-relative of a second person who lives

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[439] *Ibid.*, section 1.

[440] The Report, supra note 400, states "An important part of these legal reforms concerning domestic partners and people in marriage like relationships is that they do not require or depend on the existence of a sexual relationship between the parties. That is a matter that is personal and private to consenting adults. ...the use of the term "marriage-like relationship" does not imply the need for sexual intimacy."

[441] The draft *Family Status Recognition Act*, in the notes to section 1, states "In most cases (particularly for the purposes of conflict of interest or establishing arms length transactions) the fact of the relationship, not its duration, is the crucial element".

[442] Including support and property rights at the end of the relationship, qualifying for special tax status or government grants and entitlements, pension rights and succession rights, and to assert entitlement to a relational claim, where the relationship must have lasted for 2 years before it will be recognized.

[443] *Ibid.*, section 3. The draft further states in section 3(2) that "a determination...of whether a relationship is marriage-like must be based on objective factors, not the subjective intent of the parties." Section 3(3) provides that "the absence of an express or implied life-long commitment between persons, or the finding that the parties expressly or impliedly intended their mutual commitment to be temporary, does not prevent a finding that the relationship is marriage-like if the parties have, on an objective assessment, a relationship that is equivalent to marriage". Section 3(4) states that "a marriage like relationship does not arise between persons who cohabit if they keep their finances separate and one of both parties throughout the relationship expressly denies that the relationship is marriage-like". In the notes, the Institute describes the distinctions between section 3(3) and 3(4): "subs.3(3) provides that the absence of the subjective intent to form a marriage-like relationship does not prevent a finding of a marriage like relationship. Subs.3(4) provides that a finding of an express subjective intent against the formation of such a relationship would be conclusive where the parties did not merge their finances".

with the second person in a close association that is the equivalent of a family relationship".[444] According to the BCLI, "the policy is to recognize the family status of people, including non-relatives, who live together as family (as opposed to roommates, boarders, or live-in employees, such as a housekeeper or other kinds of domestic staff)."[445] The Report stated that it will be up to the courts to determine whether or not the relationship is sufficiently close to qualify as a family relationship. "Clearly, simply sharing a residence is not in itself sufficient to create a relationship that is equivalent of family. In most cases, something more in terms of how the parties regard each other, and conduct their domestic and financial affairs, would be required."[446] The BCLI thus recommends the inclusion of a much broader range of relationships within the concept of "family". The phrase "close relationship that is the equivalent of a family relationship" is intended to capture relationships that are neither spousal, nor blood-relatives. It is an open-ended definition, with considerable judicial discretion.

The Continuing Viability of the Conjugal/Non-conjugal Distinction?

The New South Wales legislation and the British Columbia Law Institute study suggest that it is both possible and desirable to maintain a distinction between conjugal and non-conjugal relationships, although both abandon the language of conjugality. The New South Wales legislation distinguishes between *de facto* relationships and close personal relationships. The BCLI Report distinguishes between a spousal (marriage like) and family relationship (close relationship that is equivalent to family). Both are effectively maintaining a distinction between spousal relationships and other familial relationships, while still recommending that a range of legal rights and responsibilities be extended to non-traditional relationships. However, neither use the language of conjugality/non-conjugality. And both attempt to move away from the implicit association of spousal status with a sexual relationship. Under both the New South Wales legislation and the BCLI

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[444] *Ibid.*, section 1.

[445] *Ibid.*, notes to section 1.

[446] BCLI Report, *supra* note 400.

recommendations, a sexual relationship would not be required to establish a *de facto* or marriage-like relationship.

The advantage of an approach that maintains a distinction between conjugal and non-conjugal is that it would cause the least disruption within the existing federal legal landscape. If Bill C-23 is enacted, the *Modernization of Benefits and Obligations Act* will extend legal rights and responsibilities on the basis of conjugality. It will define common law partner based on the idea of cohabiting in a conjugal relationship. Maintaining a distinction between conjugal and non-conjugal couples would allow the expansion of the legal framework to include non-conjugal couples, where appropriate, without requiring substantial reform to the recognition of conjugal couples.

There are, however, a number of disadvantages with this approach to which we have already alluded. There is the increasingly conceptual difficulty of sustaining the validity of the distinction. As we have argued above, in the aftermath of *M. v. H.*, it is clear that the legal distinction is not simply the existence of a sexual relationship, and the distinction between conjugal and non-conjugal has become more elusive. The fact that our law retains this distinction begs the larger, and perhaps increasingly unanswerable question: What *is* the difference between conjugal and non-conjugal couples, and what significance if any should attach to this difference? Despite the legal tests, is the difference still about the existence of a sexual relationship or perhaps the possibility of an otherwise legitimate sexual relationship? For example, even if a couple does not currently have a sexual relationship, is it about having had one in the past? Is it about the possibility (or expectation) that they could have a legitimate sexual relationship (thereby excluding a range of familial relationships from the scope of "spouse")? [447]

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[447] The extent to which conjugality continues to be associated with sex was evident in the debates surrounding Bill C-23. For example, Reform Party MPs argued at some length that the existence of a sexual relationship was an inappropriate basis for the allocation of rights and responsibilities. This argument can be seen as a thinly veiled effort to oppose the extension of rights and responsibilities to same sex couples, particularly given their support for limiting the definition of marriage to oppose sex couples (Svend Robinson, MP, makes this point in his comments on Second Reading: "I would note as well that each and every one of those members of parliament who is now speaking out against this bill is saying that they should oppose this bill because it does not go far enough, it does not recognize other dependent relationships like two sisters living together or two elderly gentlemen sharing a home. Without exception each and every one of those members has spoken against basic equality for gay and lesbian people. That

Is it also a question of commitment? Married spouses and domestic partners can be seen to have publicly and voluntarily assumed a mutual commitment to one another that may be absent in other kinds of relationships. However, the very nature of an ascribed spousal status is that it imposes spousal status, and its concomitant rights and responsibilities in the absence of such a publicly and voluntarily assumed commitment. Is it a question of expectation, or reasonable expectations? Persons in "relationships tantamount to spousal"[448] have increasingly come to have a set of expectations about what the relationship involves – particularly, expectations about economic interdependency; expectations about economically intertwined lives that extend indefinitely into the future. These are at the same time expectations that are partially, but not fully reflected in the law. As we have suggested above, popular opinion seems to be that the law already includes these common law relationships on the same basis as marriage.[449] These expectations – partially created and reinforced by the law itself – may not extend to the same extent to other types of adult relationships. Individuals in non-conjugal relationships may not have the same expectation that their lives will remain economically intertwined indefinitely into the future. Or they may not have the same expectation about the *legal* implications of their relationships.

However, such expectations may more appropriately be a question of fact – some of those who live in these non-conjugal relationships may well expect that their lives will remain economically intertwined indefinitely into the future. Moreover, the fact that they do not expect the law to protect

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is their agenda. They do not believe in it." *House of Commons Debates (Hansard 049)* 15 February 2000 at 1245.) Nevertheless, it does raise a serious question about the ongoing distinction between conjugal and non conjugal couples. Reform Party MP Eric Lowther, after speaking at length about the importance of the traditional definition of marriage and of promoting the institution of marriage, stated: "There are many types of gender relationships: siblings, friends, roommates, partners, et cetera. However, the only relationship the government wants to include is when two people of the same gender are involved in private sexual activity, or what is more commonly known as homosexuality. No sex and no benefits is the government's approach to this bill. Even if everything else is the same, even if there is a long time cohabitation and dependency, if there is no sex there are no benefits. Bill C-23 is a benefits for sex bill. It is crazy." *Ibid.* at 1135-1140. The Honourable Member misstates the scope of the Bill (which extends benefits *and obligations* to same sex *and opposite sex common law couples)* and misrepresents the current test for conjugality (within which following *M. v. H.* a sexual relationship is but one potentially relevant factor). However, his comments do capture the extent to which, in the public imagination, conjugality continues to be associated with a sexual relationship, as well as the extent to which the mere existence of a sexual relationship increasingly seems to be an inappropriate marker for the extension of rights and responsibilities.

[448] *Petkus v. Becker*, *supra* note 104.

them may say more about the inadequacy of the law than it does about the actual distinctions between conjugal and non-conjugal couples. And this argument may overstate the extent of the legal exclusion of these non-conjugal couples. It is simply not the case that conjugal relationships are included, and non-conjugal excluded. As we reviewed above, federal law already ascribes relationship status in a broad range of non-conjugal relationships (i.e. through the language of dependants, related persons, etc).

The theme that runs throughout our discussion is that the distinction between conjugal and non-conjugal couples is dissolving. It is increasingly difficult to find a sustainable basis for this distinction – beyond a basic "I know it when I see it" approach that seems to inform much of the debate. Our discussion would suggest that we are of the view that the distinction should be abandoned, and that the law ought to move towards a more expansive definition of ascribed relationship status that would include both conjugal and non-conjugal couples. We could return to our earlier recommendation of replacing the term "cohabiting in a conjugal relationship" with a more specific definition, such as "living together in a relationship of economic interdependency and emotional intimacy" – or, in a close personal relationship of economic interdependency.

However, there remains the political reality that Bill C-23 will extend legal recognition on the basis of conjugality. The debates around the Bill suggest that conjugality is for some a meaningful social and legal category, and that any further extension of rights and obligations to other adult relationships should leave this category intact. In introducing the Bill for second reading in the House of Commons, Minister of Justice Anne McLellan specifically stated her commitment to this distinction. "[T]here is a qualitative difference between the relationships addressed in Bill C-23 and the types of relationships that may exist among relatives, siblings or friends living under the same roof and sharing household expenses".[450] The Minister then noted that adult Canadians who currently live in these dependency relationships may welcome the extension of benefits, but perhaps

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[449] See OLRC Report, supra note 409, and BCLI Report *supra* note 400.

not the accompanying legal obligations, and raised a series of important questions about how these relationships of dependency ought to be recognized. While these are indeed important questions, the significance of the quotation here lies in the blanket assertion of the "qualitative difference" between conjugal and non-conjugal relationships. [451]

There also remains the political reality that Bill C-23 does not include a definition of conjugality, and it seems unlikely that political interest in embracing the challenge will arise in the future. It would appear that the government prefers to leave this perplexing issue to the courts. It is likely that, at least for the foreseeable future, it will remain for the courts to develop and apply a reasonable definition to conjugality.

2. Ascribing Non-conjugal Relationship Status

As we discussed above, federal law already ascribes relational status in non-conjugal contexts, through a range of relational definitions. The terms "dependant" and "related person" are used broadly in federal statutes to include both conjugal and non-conjugal relationships. "Dependant" for example might include married spouses, common law partners, parents and children, as well as other "relatives" living in the same household. "Related persons" often includes persons related to marriage, blood or adoption. "Immediate family" and "near relative" are also used to describe and include a number of non-conjugal relationships. The problem therefore is not one of the total exclusion of non-conjugal relationships, but rather, the partiality and inconsistency of their inclusion. Some relationships are included for some purposes and not others. And these relationships are defined in different ways for different purposes. A strong case can be made for the need to rationalize the state's approach to these relationships. The lack of consistency and

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[450] See, *House of Commons Debates (Hansard 049)*, 15 February 2000 at 1110.

[451] The debates over Bill C-23 included a number of similar assertions. For example, Svend Robinson, MP, said "I do not know if the honourable member has brothers or sisters, but if he is suggesting that his relationships with his brother or his sister is qualitatively the same as his relationship with his wife, that is a ludicrous suggestion. We can look at other relationships of dependency, but the fact of the matter is that they are qualitatively different from the relationship that gay or lesbian people have with their partners". *Ibid.* at 1300. At the same time, however, Robinson emphasized

uniformity makes it difficult for individuals to know when their relationships are included, and when they are not.

Further, non-conjugal relationships tend to be included only if they involve individuals who are related to one another. "Dependant", "related person" and most of the other relational terms deployed in federal statutes only include individuals who are related in some way (for example, by blood, marriage, common law partnership or adoption). Very few federal statutes include a relational term that could apply to individuals who live together but who are not related.[452] If two unrelated individuals live together in a close, but non-conjugal relationship, pool their economic resources and become economically interdependent, there is a strong case to be made that they ought to be included for the purposes of at least some federal laws.[453] While it is unlikely that a single term can be deployed to replace the range of existing relational terms, it may be possible to develop a less confusing and haphazard approach to ascribing relational status.

As noted above, the New South Wales legislation uses the broad term of "domestic relationships" to include both conjugal and non-conjugal couples, and the term "close personal relationship" to ascribe relational status, and in turn, a number of rights and responsibilities, to non-conjugal couples. Section 5 of the *Property (Relationships) Legislation Amendment Act 1999* describes a domestic relationship as including "a close personal relationship (other than marriage or a de facto relationship) between two adult persons, whether or not related by family, who are living together, one or each of whom provides the other with domestic services and personal care."[454]

The BCLI Report similarly recommended that the state "recognize people (including non-relatives) who live with another in a close relationship that is the equivalent of a family

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in his remarks that a conjugal relationship is not simply about a sexual relationship, and cited the test for conjugality set out by the Supreme Court of Canada in *M. v. H.*

[452] For example, the *Witness Protection Program Act* uses a very broad relational term - "a person who because of their relationship to or association with a person". Section 42(1) of the *Pension Act* defines "dependant" as any person entitled under court order to support. See supra at note 313 and Table Five.

[453] See Section B below for a discussion of the specific laws within which such relationships ought to be included.

[454] Section 5, *Property (Relationships) Legislation Amendment Act 1999.*

relationship".[455] As noted above, it did not recommend a detailed definition, but rather, would leave it to the courts to determined whether the relationship was sufficiently close to qualify as a family relationship. In the Institute's view, a shared residence would not suffice; rather "something more in terms of how the parties regard each other, and conduct their domestic and financial affairs, would be required."[456]

A similar definition was suggested by the Law Reform Commission of Nova Scotia for the purposes of the division of property legislation. The Commission borrowed from the definition included in the *Australian Capital Territory Domestic Relationships Act* 1994, which refers to a "a personal relationship (other than a legal marriage) between two adults in which one provides personal or financial commitment and support of a domestic nature for the benefit of the other".[457]

(a) A new relational term

We are of the view that federal law should consider a new relational category that captures a broad range of non-conjugal relationships, including non-familial relationships (that is, individuals who are not related by blood, marriage, common law partnership or adoption) . There are a number of terms that could be used, such as a "domestic relationship", a "household relationship", or a "close personal relationship". There are advantages and disadvantages to each of these terms.

A household relationship signals that the individuals must be living together, but in no way suggests that they must be conjugal or familial. However, the term may be overly broad, since it may leave the impression that it applies to any group of individuals who live together in a shared household, regardless of the nature of the relationships between them. It could accurately describe

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[455] ECLI Report, *supra* note 400.

[456] *Ibid.*

[457] Law Reform Commission of Nova Scotia *Final Report, Reform of the Law Dealing with Matrimonial Property in Nova Scotia* March 1997, at 25. The Law Commission seems to have been specifically contemplating the inclusion only of cohabiting relationships that were functionally similar to marriage. For example, at p. 1, the Commission writes: "...the Commission has reached the view that most cohabitation relationships are functionally similar to marital relationships, and deserve to be treated similarly by the law. Human beings seek out long-term relationships for a variety of reasons, including companionship, love, emotional support, sexual intimacy, procreation, economic need and social expectation. Such relationships, especially but not exclusively where there are children, often generate patterns of economic dependency". However, the proposed definition does not appear to be limited to conjugal couples.

relationships such as roommates or boarders, who do constitute a single household, but whose lives may not be at all intertwined or interdependent.

A close relationship, or close personal relationship, approximates the language adopted in the New South Wales legislation, and the language suggested in the BCLI Report. It does not in and of itself signal that individuals must be living together, although this could be part of the definition. The term "close" is vague. While the definition could attempt to give more precise content to the term, it might remain a vague and confusing concept.

A 'domestic relationship' closely approximates the term 'domestic partner', which we have recommended in relation to domestic partnership regimes. This may have both advantages and disadvantages. Since we recommend that both conjugal and non-conjugal couples may register their relationships as domestic partners, the term "domestic relationship" may appropriately and consistently signal that the term is not restricted to conjugality. However, the similarity of "domestic partner" and "domestic relationship" may lead to some confusion. "A person in a domestic relationship" would not have the same meaning as a "domestic partner", since the former would be an ascribed status and the latter, a voluntarily assumed status.

While each term has its relative advantages and disadvantages, we are inclined to suggest the adoption of the term "domestic relationship." We deploy this term in the discussion that follows.

(b) A new relational definition

The next question would then be the definition of this new relational category. The term could be defined as 'living together in a close relationship' (New South Wales), or 'a close relationship that is equivalent to a family relationship'(BCLI). Both of these open-ended definitions leave much to the courts, to define the nature of "close relationships" or the nature of a relationship "equivalent to a family relationship". In our view, it would be preferable, if possible, to provide somewhat more guidance to the courts as to the kinds of factors that might be relevant in deciding whether the relationship is sufficiently "close" or sufficiently "equivalent to a family relationship"'.

It might be helpful to revisit the proposals in our earlier work for redefining conjugality.[458] The crux of the definition was the combination of emotional intimacy and economic interdependency. The criticism of this definition was that it was potentially over-inclusive; that it would include relationships that were not conjugal, such as adult siblings or other unrelated individuals who shared a household.[459] As such, it may be that these elements of the definition are quite appropriate to describe the non-conjugal relationships to be included within the term "domestic relationship". It is the combination of joint residence, emotional intimacy and economic interdependency that gives rise to the unique nature of the relationship, such that these relationships ought to be included in at least some legal rights and responsibilities. A fourth element that may also be relevant is a commitment to continue to live together in this interdependent relationship. While this commitment is an important reason that we recognize adult relationships, it is difficult to measure. It is inherently subjective, and particularly when relationships break down, the parties may have very different versions of the degree of their long term commitment to one another. This element of commitment could be captured by a duration requirement – that is – that the individuals have lived together for a specified period of time before they are included within the definition. However, even a duration requirement is an imperfect measure of commitment, in so far as it uses past history to measure potential commitment into the future.

While the precise drafting needs further consideration, we are of the view that the definition should include joint residence, emotional intimacy and economic interdependency. It could be phrased in a number of ways, such as "living together in a close emotional and economic relationship", "living together in an emotionally and economically interdependent relationship" or "living together in a close relationship, characterized by economic interdependency". But, the crux of the definition would be three fold: a shared residential relationship, a close emotional relationship, and an economically intertwined relationship. These three factors capture the basic value that

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[458] See Cossman and Ryder *supra* note 405 at 83.

should underlie the legal recognition of adult relationships: the promotion and protection of relationships of care and commitment.

3. Conclusion

Ascribing relationship status is an exercise fraught with difficulty. First, there is the threshold question of when it is appropriate to ascribe a relational status. This is particularly challenging in the spousal context, where individuals have not chosen to voluntarily assume the status through marriage. When should the state ascribe spousal status to individuals who have not voluntarily assumed spousal status? If domestic partnership regimes are enacted that allow non-conjugal couples to register their relationships as well, this threshold question will similarly apply to ascribing relational status. When should the state ascribe relational status to individuals who have not voluntarily assumed relational status? The values of autonomy and privacy must be balanced against the values of equality and security.

Secondly, a basic distinction in federal law between conjugal and non-conjugal relationships is increasingly difficult to sustain. Developing and applying a clear and predictable definition of conjugality has long been, and remains, elusive. Given the difficulty if not impossibility of making any broad conclusions about the differences both between and among conjugal and non-conjugal relationships, it is imperative that the question of the legal rights and responsibilities of adult relationships be addressed much more specifically. In what policy contexts should what kinds of relationships be recognized? If the question can not be answered generally, it must be answered specifically - on an objective by objective, statute by statute, basis. To the extent that specific legislative objectives are considered to appropriately apply to these non-conjugal relationships, many of the difficulties of the conjugal/non conjugal distinction may be avoided altogether. If a particular objective – such as recognising the potential existence of shared economic interests in family relationships giving rise to potential conflicts of interest – is considered to appropriately apply

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[459] See discussion *supra* at note 432.

to both conjugal and non-conjugal relationships, then it will not be necessary to engage in the increasingly difficult exercise of distinguishing between these relationships. However, if a particular objective is considered appropriate for conjugal, but not for non-conjugal relationships, then a workable definition of conjugality will continue to be required. Again, these are questions that can only be addressed specifically – a task to which we turn in the section that follows.

II. Evaluating Legal Options in the Context of Specific Legislative Objectives

In this section, we return to specific statutes and specific legislative objectives, for the purpose of recommending appropriate relational criteria. In our view, no one of the three models, or no single combination of the three models – marriage, registered domestic partnerships or ascribed status – is appropriate for realizing all of the objectives of federal legislation. The solution lies in finding the particular combination of the legal options that can best accomplish the legislative objectives listed in Part I while respecting the values of autonomy, privacy, equality and security. We return to the legislative provisions singled out for detailed examination in Part I above, and attempt to formulate recommendations appropriate for each.

A. Regulating the Formation and Dissolution of Adult Personal Relationships

Bill C-23 will not affect the law of marriage or divorce. The Bill defines marriage as the union of one man and one woman to the exclusion of all others, which confirms the common law rule regarding the opposite-sex requirement of the capacity to marry. Marriage continues to be governed by these and other common law rules regarding the capacity to marry. Divorce in turn continues to be governed by the *Divorce Act*, which by definition only applies to couples who have been married,

and who have applied to terminate their marital status. As a result, the government objectives of regulating the formation and dissolution of adult personal relationships continue under federal law to apply only to married couples. Unmarried conjugal couples, whether of the same or opposite sex, are not included within the ambit of these provisions. Nor are non-conjugal relationships.

An argument could be made that these conjugal and non-conjugal relationships might be assisted by rules or procedures that more clearly demarcate the beginning (or end) of their relationships. Federal jurisdiction in this field will however be limited to demarcating relational status for the purposes of determining entitlement to rights and obligations within federal areas of jurisdiction. The scope of federal jurisdiction is analogous to the federal government's ability to pass laws putting in place definitions of common law spouses or partners, and should not be confused with the scope of federal jurisdiction over marriage and divorce.

Under section 91(26) of the *Constitution Act, 1867*, Parliament has the power to make laws in relation to "marriage and divorce". The courts have held that this jurisdiction includes the power to legislate with respect to matters corollary to divorce, such as spousal support, child support and child custody. In our view, it is unlikely that the courts would hold that Parliament has jurisdiction to make laws in relation to these matters for unmarried conjugal cohabitants or non-conjugal cohabitants. In accordance with the "living tree" principle of constitutional interpretation, it could be argued that federal jurisdiction in relation to marriage and divorce needs to evolve to reflect the demographic and normative transformations in the ways in which individuals form and leave conjugal relationships, which has transformed significantly since the division of powers was established in the Constitution. Federal jurisdiction in relation to marriage and divorce could perhaps be argued as broadly including jurisdiction in relation to conjugal relationships.

However, this argument – admittedly precarious in its own right – could not be extended to include non-conjugal relationships. It would be incredulous to argue that the federal jurisdiction over marriage and divorce extended to the regulation of all adult personal relationships. Moreover, any effort to extend federal jurisdiction over marriage and divorce to include unmarried cohabitants

would amount to a serious incursion on provincial jurisdiction in relation to property and civil rights in the province.

Even if the federal government cannot regulate entry and exit from non-conjugal relationships pursuant to its jurisdiction over marriage and divorce, its other heads of power enable it to regulate entry and exit from a civil status for the purposes of determining the scope of rights and obligations within validly enacted federal legislation. Consider, for example, the constitutional basis of Bill C-23. The Bill is not valid as an exercise of the federal power in relation to marriage and divorce. Rather, it is valid as an exercise of the federal government's jurisdiction in relation to pensions, criminal law, banking, bankruptcy and so on. Just as the federal government must necessarily have jurisdiction to ascribe relational status to spouses and partners for the purposes of federal statutes, so too must it have the jurisdiction to add new relational categories to federal statutes. Therefore, the federal government could enact a registered domestic partnership regime for the purposes of including partners within federal laws that are in pith and substance in relation to matters within federal jurisdiction.

Individuals could register their domestic partnerships and thereby be entitled to the range of rights and responsibilities within federal law. Within such a scheme, it would be important to have clearly demarcated rules for the entry into and exit from these relationships. A registered domestic partnership scheme would have to set out who could enter into domestic relationships (for example, any two individuals who have reached the age of 18 years), and the procedural and evidentiary requirements (for example, signed and witnessed registration forms). Similarly, the scheme would have to set out the rules and procedures for exiting a domestic relationship (for example, unilateral termination by appropriate notice to the other party, effective date of the termination).[460]

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[460] However, as mentioned above, the implementation of a registered partner status for the purposes of federal laws would could have no direct or immediate impact on provincial laws. Registered partners would remain unrecognized in provincial laws until they are also amended to accommodate the new civil status. While a coordinated federal/provincial/territorial initiative would be preferable, in the absence of such agreement, the federal government could proceed on much the same basis as it did with Bill C-23, creating a new partnership status that is not yet recognized within provincial legislation.

Finally, the federal government does have jurisdiction to change the definition of marriage to include same-sex couples, who could be included with the definition of marriage, and who could then be included in the *Divorce Act*. If the definition of marriage was amended to include same-sex couples, then the definition of spouse in the *Divorce Act* would require amendment. Spouse is currently defined as "either a man or woman who are married to each other". This definition would have to be changed to "either of two persons who are married to each other". [461]

As discussed extensively above, there is a strong equality argument in favour of the inclusion of same-sex couples within the definition of marriage.[462] Same-sex couples have an equal claim to the importance of being able to publicly announce their commitment, voluntarily assume mutual responsibilities, and seek legal recognition of their personal relationships. As we discussed above, amending the definition of marriage would also be consistent with the value of recognizing relationships of care and commitment in a manner that respects autonomy, privacy, equality and security. A government committed to promoting these normative values in the legal regulation of adult relationships ought to recognize same-sex marriage. However, as we also discussed above, the political will to do so has not yet materialized. The inclusion of a definition of marriage in Bill C-23 is a regressive step that demonstrates that Parliament is not yet prepared to respond to the shifting public opinion polls that demonstrate that the majority of Canadians now support the recognition of same-sex marriage.

B. Responding to the Consequences of Emotional and Economic Interdependence in Adult Personal Relationships

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[461] Some attention would also have to be directed to the adultery provisions in the current *Divorce Act*. According to section 8(2)(b)(i), adultery is a ground for establishing marital break down. However, adultery has been defined over the years by the courts as requiring heterosexual intercourse. Homosexual sex does not constitute adultery. If same sex couples were to be included within the *Divorce Act*, they would have to be subject to the same grounds for divorce. If adultery was to be maintained as a ground for divorce, it would have to be extended to include homosexual sex. However, this would result in a significant rewriting of the common law requirements for adultery – broadening it to include anal and/or oral sex, for same and opposite sex couples. The preferable route would be to revisit and abandon the fault based grounds for divorce altogether.

[462] See *supra* at notes 341-364.

1. Supporting the integrity and stability of Interdependent Relationships

(a) Immigration

The *Immigration Act* will not be amended by Bill C-23. As a result, same-sex and opposite-sex cohabiting couples are still excluded from the definition of spouse within the sponsorship provisions. Because of the prohibition on same-sex marriage, and the lack of any domestic partnership regime whereby same-sex couples can opt in, they are completely excluded from any of the sponsorship provisions. This blanket exclusion cannot be justified. These couples have the same needs for family reunification as other conjugal couples, and the same entitlement to have the integrity of their relationships recognized. Common law opposite-sex couples are also excluded from the definition of accompanying dependants, family class or assisted relatives – although at least some of these couples might be able to marry in order to qualify for sponsorship.

However, the Minister of Citizenship has recently introduced Bill C-31, the *Immigration and Refugee Protection Act*,[463] and has promised supporting regulations in the coming months that will expand the "family class". This will include "modernizing the definition of family class to ensure consistency in accordance with government legislation under consideration – family class will include spouses, common-law and same-sex partners."[464]

No additional information is available at this time as to how the regulations will be drafted. However, the commitment seems to follow from the recommendations of the Advisory Committee to the Immigration Legislative Review, entitled *Not Just Numbers: A Canadian Framework for Future Immigration*.[465] In their view, "the defining principle in using the term 'spouse' must be emotional dependency as demonstrated through cohabitation".[466] Accordingly, the Report recommended that

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[463] Bill C-31, 2nd Session, 36th Parliament, 48-49 Elizabeth II, 1999-2000.

[464] Citizenship and Immigration Canada, "Opening the Front Door Wider" Backgrounder #2, News Release 2000-09.

[465] Advisory Committee to the Immigration Legislative Review, entitled *Not Just Numbers: A Canadian Framework for Future Immigration* (Ottawa: Citizenship and Immigration Canada, 1997).

[466] *Ibid.* at 43.

the definition of spouse for the purposes of immigration and citizenship be redefined to include not only married partners, but also "a partner in an intimate relationship, including cohabitation of at least one year in duration, with the burden of proof resting on the applicant."[467] Given the approach taken in Bill C-23, it is likely that the inclusion of these cohabiting couples will take the form of adding "common law partner" to the regulatory scheme.

Non-conjugal relationships

Many non-conjugal relationships are recognized, under the provisions for family class sponsorship as well as assisted relative immigration. Only non-conjugal couples who are not relatives within the meaning of the family class or assisted relatives are excluded. There is no provision whereby an individual may be able to sponsor their closest friend, with whom they may have lived in a long term relationship of economic and emotional interdependency. Rather, only relationships of blood, marriage and adoption are recognized under the *Act*.

In the *Not Just Numbers* report, the Advisory Committee recommended a number of amendments to the relational terms used in the *Immigration Act* that would include these excluded non-conjugal relationships. The Report was critical of the ways in which the *Immigration Act* sets out to define in considerable detail the degrees of relationship that can serve as the basis for sponsorship within the Family Class. "We prefer that family reunification be achieved on a functional rather than a purely categorical basis."[468] After quoting from Justice L'Heureux Dubé's minority opinion in *Mossop* regarding the increasing diversity of Canadian families, the Report concluded that "individuals best understand where their emotional priorities lie, and consequently what constitutes their family". [469]

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[467] *Ibid.* at 44.

[468] *Ibid.* at 43.

[469] *Ibid.* at 43.

The Report recommended that the Family Class "be divided into three broad groupings, reflecting the varying degrees of emotional intimacy and dependency found in family relationships". The first tier would include "those in the most intimate family core: spouses and dependent children". The second tier would include fiancé(e)s, parents and when a sponsor's parents are deceased, grandparents. The third tier would be a significantly broader category than currently found in the family class:

> Many individuals form strong emotional bonds with persons who are not their intimate partners or spouses, nor their biological parents, nor even blood relatives. More to the point, some people will be willing to demonstrate the importance of these other bonds by making a long-term financial commitment to assist the arrival, establishment and integration of these individuals into the Canadian community and economy. We believe that permitting such sponsorship can only contribute to our goal of strengthening the role of the family in its many forms as a primary unit of self-sufficiency and security.[470]

The Report stated this "third tier" family class "will permit sponsors to decide who is most important to them, and who is part of what they consider family in the broadest sense. It could even include a best friend."[471] It recommended that third tier sponsors "be required to demonstrate that the individual they are sponsoring is known and emotionally important to them."[472] The crucial aspect of this third tier is that the sponsor be prepared to assume "a long term enforceable sponsorship commitment".[473]

We believe that there is considerable merit to these recommendations. Non-conjugal relationships that currently fall outside of the family class may be characterized by the same strong emotional intimacy that justifies sponsorship within the family class. Individuals in relationships of caring and commitment, including registered partners and domestic relationships should also be entitled to recognition and protection. Individuals should be able to decide who is most important to them, to define their own sense of family, and to then undertake the very serious financial

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[470] *Ibid.* at 47.

[471] *Ibid.*

[472] *Ibid.* at 48.

[473] *Ibid.* at 45. The Report recommends some additional restrictions on this third tier, namely, that principal applicants in this tier be required to have successfully completed secondary school, and either be proficient in French or English, or pay a language tuition fee reflecting the cost of language training in Canada.

commitment that accompanies sponsorship. It is an approach that balances the values of autonomy and equality, while promoting the value of caring and committed relationships.

(b) Privileged Relational Communications

We argued above that the special evidentiary rules regarding spousal competence and compellability should be abrogated so that all witnesses are placed on the same footing without regard to any relationship they have with an accused person. The reason for this recommendation is that the objectives of promoting the search for truth, respecting autonomy and fostering the physical and emotional security of witness spouses, outweigh the uncertain contribution the current rules make to the promotion of marital harmony or integrity. However, we recommended that the marital communication privilege be retained and extended, because it is more firmly grounded in the protection of privacy and the promotion of candour essential to the integrity of adult personal relationships.

At present, the privilege set out in s.4(3) of the *Canada Evidence Act* applies only to marital communications. One implication of Bill C-23 is that federal public policy has rejected a hierarchy of values between marriage and common law partnerships. There can be no assurance that any particular marriage or partnership will in fact embody the ideals of companionship, commitment, intimacy and mutual support that the state is seeking to support. However, marriage and common law partnerships have equivalent potential to do so and attempting to draw qualitative distinctions within categories of relationships, while sound in principle, in practice would involve significant invasions of privacy. Therefore, the privilege should attach to all private communications between spouses and between common law partners. Similarly, the relationships of registered domestic partners are likely to be the relationships of primary emotional significance in the partners' lives. This is also true of domestic relationships, i.e., persons who are living together in non-conjugal relationships characterized by emotional and economic interdependence for at least one year. The state has a strong interest in protecting the privacy and promoting candour and intimacy in each of

these categories. For these reasons, we recommend that the privilege in s.4(3) be retained and extended beyond marital communications to include private communications between common law partners, registered domestic partners, and persons who have lived together in a relationship of economic and emotional interdependence for at least one year.

A case could be made for an even broader definition of the persons entitled to claim the privilege. Instead of imposing a "living together" requirement, the definition could be extended to any two persons who have a relationship of emotional interdependence that is of primary importance in each other's lives. Such a definition would recognize that some people's most emotionally supportive and intimate relationships are with persons with whom they do not share a household. They can rightly assert that their communications with their confidante should be no less privileged than communications between spouses, partners or persons living together in non-conjugal relationships. However, such an approach has the significant disadvantage of giving rise to uncertainties in its administration that are much larger than if the definition is limited to persons living together. In the context of criminal trials, uncertainties about whether or not evidence is admissible should be avoided if at all possible.

2. Recognizing the Potential Existence of Shared Economic Interests in Interdependent Relationships

In general we believe that the state should define relationships that give rise to potential conflicts of interest broadly, so long as basic entitlements are not at stake, and so long as relational presumptions can be rebutted through the presentation of evidence. It is inappropriate to put in place inflexible rules that presume, for example, that spouses or partners never deal with each other at arm's length because there will in fact be a great diversity of relationships within any particular legal category.

An example of a statutory context where it is desirable to cast the relational net broadly is s.632(b) of the *Criminal Code*, the provision that enables judges to exclude a person from a jury if he or she has a "relationship" with one of the participants in the trial. In contrast to many other statutory

provisions seeking to identify shared interests in personal relationships, this provision of the Code is notable in not specifying the kinds of relationships that should excuse jurors. By leaving out a definition, Parliament has wisely left the matter to the discretion of trial judges and made it possible to respond to any kind of personal relationship, including friendships. Such a broad sweep is appropriate in this context for two reasons. First, the exclusion of related jurors has no negative consequences. The right to a jury trial does not include the right to have any particular person serve on the jury. Similarly, the right to serve on a jury does not require service on any particular jury. Second, where both fairness and the appearance of fairness are at stake, it is desirable to cast the relational net as broadly as possible.

Consider also provisions of laws, like the *Bank Act*, that place restrictions on the ability of persons related to directors or officers of financial institutions to enter into financial transactions with those institutions. These laws are designed to prevent the possibility that transactions between related parties will give rise to preferential treatment or the appearance of preferential treatment. There is a strong argument for casting the relational net broadly in this context as well. The objective of these statutes apply to anyone in a close personal relationship – spouses, relatives, common law partners, registered domestic partners and domestic relatives. Fundamental interests are not normally at stake, since the related party has the option of approaching another institution. The negative consequences of a presumption against fair dealing between related parties can be avoided if the presumption is rebuttable, that is, if the related parties are free to present evidence that their interests are not intertwined or that the proposed deal is in fact fair.

3. Tailoring Financial Benefits and Penalties to Recognize the Consequences of Relationships of Economic Dependence or Interdependence

(a) Guaranteed Income Supplement of *Old Age Security Act*

According to the current provisions of the *Old Age Security Act*, as described above in Part I, whether a pensioner is entitled to a guaranteed income supplement (GIS) is determined by a

formula that uses relational criteria. If a pensioner does not have a spouse or common law partner who is also a pensioner, then the GIS is calculated at the higher "single rate", whether or not the pensioner is living with another person in a conjugal or non-conjugal relationship. The amount of the pensioner's entitlement will be reduced by a formula that takes into account his or her income, or, if the pensioner has a spouse or common law partner, the combined income of the pensioner and his or her spouse/partner. If two pensioners are living together, then the amount of the GIS depends on whether the relationship is conjugal or non-conjugal. If the relationship is conjugal (i.e., the pensioners are spouses or common law partners), then the two pensioners each receive the lower "conjugal rate", reduced by a formula that takes into account their combined income. If their relationship is non-conjugal, the two pensioners both receive the higher "single rate", reduced by a formula that takes into account the claimant's income alone (the income of non-conjugal cohabitants need not be declared).

Two assumptions explain the use of relational criteria in the scheme. The first is the assumption of economies of scale among cohabiting pensioners. The second is the assumption that the combined income of cohabiting persons is available to meet their needs. The troubling effect of these assumptions is to reduce or eliminate the GIS entitlements of old age pensioners if they are living with another pensioner in a relationship of caring and commitment.

The economies of scale assumption that underlies the lower conjugal rate can be supported by empirical evidence: housing and food costs for two persons living together are less than those incurred by two single persons living in separate households. The difficulty with the lower conjugal rate is that it may operate in practice to discourage the formation of valuable domestic relationships. The problem here is one that must be faced in the design of any income or means tested programme of social assistance: the principle of adjusting benefits according to actual needs clashes with the value of supporting the formation and maintenance of relationships of caring and commitment. One approach to this dilemma, adopted by the Ontario Social Assistance Review Committee in 1988, is to provide the same benefits to a couple as two individuals. This approach

can be defended on the grounds that "a major disincentive to family life" is removed "without seriously violating the principle of need."[474] The GIS provisions of the *Old Age Security Act*, on the other hand, appear to give precedence to the principle of need over the value of promoting relationships of caring and commitment.

In our view, rather than give either principle precedence over the other, the best approach would be to design the GIS provisions so that they balance the principles of need and relationship support. The principle of need does dictate that persons sharing accommodations with others receive benefits at a lower rate than persons living alone. However, the principle of relationship support suggests that the gap between the single and cohabitant rates should be set at a level that eliminates the risk that pensioners will be financially disadvantaged if they choose to live together in a relationship of caring and commitment. The gap between the single and cohabitant rates should be set at an amount significantly smaller, therefore, than the best estimate of the difference in per capita household costs based on the available empirical evidence.

Because we are not familiar with the empirical evidence, we are not equipped to judge whether the current rates are set at levels that eliminate, or at least minimize, the risk of negative consequences for the principle of relationship support. Currently, the conjugal rate is set at 65% of the single rate. The question is whether we can be confident that low income seniors reduce their living expenses by more than 35% when they share accommodation. If not, the current rate structure gives inadequate weight to the value of supporting relationships of caring and commitment. The 35% gap should be re-evaluated to determine whether it gives too much precedence to the principle of need over the principle of relationship support.

Another difficulty with the current scheme is that it applies the lower conjugal rate only in the case of two pensioners living together in a conjugal relationship. The economies of scale assumption applies equally to any persons who are sharing a household. At the moment, however,

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[474] Social Assistance Review Committee, *Transitions* (Ontario Ministry of Community and Social Services, 1988) at 162.

pensioners who are non-conjugal cohabitants and pensioners who are cohabiting in conjugal relationships with non-pensioners may claim the higher single rate. In our view, if the difference in the rates is grounded on valid empirical evidence regarding economies of scale, and if the rate is set at a level that achieves a balance between the principles of need and relationship formation, then the lower rate for cohabitants should apply whenever a pensioner is living with another person in a relationship of caring and commitment, including registered partners and domestic relations.

The second area of concern with the GIS is the use of the combined income of cohabiting spouses and partners to determine their entitlement. These provisions are based on the presumption that the combined income of cohabiting spouses and partners is available to meet the individual needs of a particular cohabitant. The reliance placed on this assumption is problematic for two reasons. First, the pooling of resources may not occur in all marital and non-marital conjugal relationships. Second, resources may be pooled by non-conjugal cohabitants living together in relationships of caring and commitment.

In our view, the presumption that combined income is available to meet the needs of persons in cohabiting relationships should not be retained in its current form. With appropriate modifications, however, we believe that it should be extended to cohabiting registered partners and domestic relationships. The problem with the current scheme, in our view, is that the presumption regarding pooled income cannot be rebutted except in the case of spousal separation. Section 15(4) of the Act provides that the Minister may treat a pensioner with a spouse as entitled to the "single rate" if the Minister is satisfied that the pensioner is separated from his or her spouse. Separation, however, is not the only circumstance that can prevent a pensioner from having access to the income of a cohabitant. Section 15(4) should be amended to enable the Minister to treat a pensioner as entitled to the "single rate" whenever the Minister is satisfied that the income of the person's spouse, common law partner, registered partner or domestic relation is not available to meet the applicant's needs.

Enabling pensioners to present evidence displacing the presumption of access to pooled income would prevent the presumption from operating in circumstances where its factual assumptions do not exist. Creating a rebuttable presumption has other advantages as well. We have already mentioned our concern about the perverse incentives generated by a scheme that accords single persons a higher OAS/GIS entitlement that they would receive if they were living with others in relationships of caring and commitment. As a general principle, we do not believe it is sound policy to deny benefits designed to meet basic individual needs simply because of the existence of an adult personal relationship *per se*. Such a scheme creates an unacceptable risk that the formation and maintenance of relationships of caring and commitment will be discouraged. This concern will be greatly alleviated if the OAS/GIS entitlement will be reduced only if the pensioner actually is receiving financial support out of the income of a cohabiting spouse, common law partner, registered partner or domestic relation. While this will ordinarily be the case, it will not always be so. Thus, the irrebuttable presumption that conjugal cohabitants have access to each other's combined income in the current scheme should be replaced by a rebuttable presumption that all cohabitants, conjugal or non-conjugal, have access to each other's combined income.

(b) Survivors' Benefits in Pension Legislation

As described in Part I above, the multitude of federal employment and veterans pension laws, the *Canada Pension Plan*, and the *Pension Benefits Standards Act* all make survivors' benefits available to spouses and common law partners on the death of contributors, veterans or employees. Survivors' benefits can be claimed regardless of gender. Nor is it necessary to establish need or dependency. Indeed, a common law partner is entitled to survivor's benefits if at least one year of cohabitation preceded the death of the contributor. While the original rationale of survivor's benefits was the presumed economic dependency of widows, the current schemes plainly serve compensatory as well as dependency objectives. Survivors' pensions seek to compensate dependent spouses/partners for the sudden loss of income on which they have depended to meet

their financial needs. And, survivors' pensions seek to compensate all spouses/partners, including those who are economically independent for facilitating the employment earnings of deceased contributors.

The most obvious difficulty with the current rules of entitlement in federal legislation is that survivors' benefits are limited to persons who are spouses or common law partners of the contributor at the time of death. The dependency and compensatory objectives of survivors' benefits are also relevant where a person was living with a contributor in a non-conjugal domestic relationship at the time of death.

The possibility of allowing individuals in domestic relationships to receive survivors' benefits should be seriously considered. The nature of their relationships may give rise to dependency or interdependency that is comparable to that arising between spouses or common law partners. As we have emphasized throughout this report, conjugal relationships are not unique in possessing the functional attributes relevant to state policy objectives. Federal pension laws fail to reflect the fact that conjugal relationships do not uniquely give rise to the kinds of dependency or interdependency to which survivor's benefits seek to respond.

At the same time, if Parliament were to add a definition of domestic relationship to the list of survivors entitled to CPP, veterans' or employment pension survivor's benefits, a number of difficulties would arise. There would frequently be a number of qualifying domestic relationships living with the contributor at the time of death. Of course, at the moment there can be multiple claimants if the deceased leaves both a common law partner and a separated spouse. However, to add domestic relationships to the mix would give rise to daunting administrative complexities in dividing the survivor's benefit between multiple domestic claimants. Moreover, the degree to which individuals in domestic relationships were dependent upon or facilitated the earnings of a contributor will vary much more dramatically than is the case with the class of spouses or common law partners as a whole. A presumption of entitlement is not justifiable, in our view, in the face of the wide variation in circumstances within the class of domestic relationships as a whole.

The best way of responding to the legitimate claims of non-conjugal cohabitants in this context, in our view, is to put in place a registered domestic partnership scheme and then add registered partners to the definitions of survivors in federal pension legislation. There is a strong case for permitting registered domestic partners to claim CPP, veterans' and employment pension survivors' benefits on the same terms as married spouses. Like husbands and wives, registered domestic partners have expressed their commitment to each other publicly, and have voluntarily subscribed to the full package of rights and obligations accorded to spouses and partners. It is a fair assumption that registered domestic partners, like husbands and wives, will have lived together in relationships of dependence or interdependence. The inclusion of registered domestic partners provides a means of responding to the legitimate claims of non-conjugal cohabitants without imposing undue costs and complexity on the administration of survivors' benefits. By registering as domestic partners, persons in either conjugal or non-conjugal relationships would, in essence, be able to designate the person they consider the appropriate recipient of their survivors' benefits. In this way, a registered partnership scheme avoids the problems of over-inclusion that would result if all domestic relatives could claim survivors' benefits at the same time as it responds to the problems of under-inclusion in current legislation.

What of the situation of a contributor who dies without a spouse, common law partner, or registered partner? According to the existing scheme of legislation, no survivor's benefits are payable in this situation even though the contribution rate to the CPP or employment pensions is not reduced to take account of single employees' relational status. If survivor's benefits are a form of entitlement earned in employment, arguably the principle of equal pay for work of equal value requires that an equivalent survivor's benefit be available to all contributors regardless of their relational status. The pay equity concern could be addressed by amending federal pension statutes to give employees without spouses or partners the option of designating the beneficiaries of their

survivor's benefits,[475] by enriching the death benefit that would be awarded to the estate of single employees, or by reducing the contribution rate of single employees.

In our view, framing the pay equity argument in this manner misses the mark. Survivors' benefits, like disability and health benefits provided as part of employment contracts, are a form of group insurance rather than an equal employment entitlement like wages. The social insurance aspect of survivors' benefits is more apparent in the Canada Pension Plan because it is a social programme that depends upon a great deal of cross-subsidization. Contributors to the CPP do not receive benefits that correspond to their contributions. For example, those who do not live to retirement age subsidize those that do. Contributors do have a legitimate claim to being treated fairly if the events that trigger the needs targeted by the statute occur. Employees' and employers' contributions to the Canada Pension Plan insure employees against their own income needs if they reach retirement age or become disabled. Similarly, employers' and employees' contributions to survivors' pensions are a form of collective insurance. Benefits are payable on death only if a certain kind of loss has materialized. The aim is to ensure that employees' spouses/partners (or their future spouses/partners) are compensated for the sudden loss of income on which they depended or to which they indirectly contributed through relational support.[476]

The social insurance aspects of employment pension benefits may not be as readily apparent as they are in a national programme like the CPP. Nevertheless, collective risk-spreading and cross-subsidization, albeit on a smaller scale, are features of survivors' benefits in employment

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[475] See the proposals along these lines in Gwen Brodsky, *Submission of the National Association of Women and the Law to the Standing Committee on National Health and Welfare on Survivor Benefits Under the Canada Pension Plan* (Ottawa: NAWL, 1987) at 15; E. Gilchrist, "Superannuation, Discrimination and Same Sex Couples", (1999) 8 Australasian Gay & Lesbian L.J. 57 at 65-7. See also J. Freeman, "Defining Family in *Mossop* v. *DSS*: The Challenge of Anti-Essentialism and Interactive Discrimination for Human Rights Litigation", (1994) 44 U.T.L.J. 41 at 64-5 (arguing that the definition of family for the purposes of entitlement to bereavement leave should depend on employee designation).

[476] Relying on the social insurance goals of the CPP, the Supreme Court of Canada has rejected two constitutional challenges to the provisions of the legislation. In *Law* v. *Canada*, [1999] 1 S.C.R. 497, the Court held that the Plan did not discriminate on the basis of age by denying survivors' benefits to young widows. In *Granovsky* v. *Canada*, 2000 SCC 28, the Court held that the Plan does not discriminate on the basis of disability by not relaxing the eligibility requirements for partially disabled persons to the same degree as it does for the totally disabled. In both cases, the Court held that the Plan does not discriminate by targeting benefits to persons most in need.

pension plans as well. From a social insurance perspective, the single employee has no more complaint about his or her estate or chosen beneficiaries being denied survivors' benefits than the able-bodied employee has about being denied disability benefits. The denial is premised on the absence of the relevant need.

It could be argued that the denial to single employees of an entitlement equivalent to survivors' benefits runs counter to the value of autonomy. Relational status, unlike age or disability, may be the result of a conscious choice. Indeed, it is a product of individuals' exercise of the fundamental freedom of intimate association. The state should not seek to influence individuals' exercise of this freedom by attaching financial incentives to any particular relational status. On this argument, the current treatment of survivors' benefits in federal pension legislation is objectionable because it asks single employees to subsidize the relational choices of spouses and partners.

We are not persuaded by the autonomy argument. We agree that the state violates the value of autonomy if it attaches financial rewards or penalties to a particular relationship status per se, without regard to its consequences. But the objective of survivors' benefits is not to reward couples or to induce people into forming relationships of caring and commitment. Rather, the objectives are to respond to the distinct needs and legitimate claims that arise in relationships. The dependency and compensatory objectives do not fit the situation of single employees.

In our view, the situation of single contributors pursuant to the CPP and federal employment pension laws - including the limitation of survivors' benefits to spouses, common law partners and (in our proposal) registered partners - is justified by the value of supporting relationships of caring and commitment. Supporting such relationships does not mean according coupled individuals preferential treatment compared to single individuals. Rather, it means recognizing and responding to the distinct consequences that accompany committed, caring relationships. Single contributors are treated differently not because their work is considered less valuable or their choice of living arrangements less worthy of concern and respect. They are treated differently because the dependence and compensatory objectives of survivors' benefits are not normally relevant to the

circumstances of single employees to anything like the same degree that they are for employees with spouses or partners.

Of course, in some cases there may be a person in a single contributor's life who is dependent upon or has supported the contributor's employment earnings. Indeed, there may be a number of such persons whose claim to survivors' benefits could be justified according to the dependence and compensatory objectives. This valid concern, however, will not be so serious if the option of registering as domestic partners is available. By putting in place a registered partnership status, and adding registered partners to the definition of survivors in pension statutes, Parliament would make the functional equivalent of a designated beneficiary option available.

In summary, we believe that the dependency and compensatory objectives of survivors' benefits will be best accomplished if the *Canada Pension Plan*, federal veteran employment pension plans, and the *Pension Benefits Standards Act* are amended to extend survivor's benefits to registered domestic partners on the same terms as married spouses. The situation would then be as follows. If at the time of death the deceased was cohabiting with a common law partner, the common law partner will be entitled to survivors' benefits. If the deceased also left a separated spouse or separated registered partner, they will be able to claim a share of the survivor's benefits in proportion to the number of years they lived with the deceased.[477] If there was no common law partner at the time of death, then the spouse or registered partner will be the sole survivor entitled to the benefits.

4. Recognizing the Economic Costs and Value of Caregiving Relationships

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[477] Former common law partners currently cannot claim survivors' benefits, presumably on the assumption that proving the existence of a past common law relationship after the contributor's death poses difficulties, and, in any case, a division of pension entitlements is now available to common law partners pursuant to the *Pension Benefits Division Act*. Former spouses currently cannot claim survivors' benefits, presumably on the assumption that an equitable division of property, including pension entitlements, took place upon divorce. If this is right, former registered partners should be excluded from the definition of survivor only if they have access to a similar right to a division of pension entitlements upon break down of the partnership.

We noted in our discussion in Part I above that no federal statute currently provides direct income support to persons who have provided unwaged domestic labour and caregiving services to members of their household. The performance of these socially valuable roles often entails substantial financial sacrifices. The government in the future ought to give serious consideration to the enactment of a homemaker's or caregiver's pension to accomplish this objective. Spousal or partnership status are crude means of identifying persons deserving of this kind of state support. The better approach in principle would be to design a scheme that can measure the actual quantity of unwaged domestic labour and caregiving provided.

5. Compensation for the loss of, or harm to, emotional and economically interdependent relationships

(a) Wrongful Death Action in the *Canada Shipping Act*

We argued above that the definition of "dependants" entitled to bring a wrongful death action arising from maritime torts is in need of reform. First of all, the word "dependant" is inapt in this context and should be replaced. It may have been an accurate description of many claimants in the nineteenth century, since many widows and children would not have had an independent source of income. Even then, claimants in fatal accident actions have never had to demonstrate dependence and the helplessness it suggests. Whether or not they have other means of financial or emotional sustenance, they are entitled to recover their relational losses. Therefore, we suggest that revised legislation adopt the terms "claimants" and "relational claims", or some equivalent neutral terminology.

The purpose of the relational claim – to compensate for the lost expectation of future economic or emotional support – suggests that the legislation should define the range of potential claimants broadly. This is especially so since inclusion in the list of claimants does not entitle one to

anything other than the right to attempt to prove such a loss through the introduction of evidence in a court proceeding. The danger of trivial relational claims being filed is reduced by other factors, such as the costs of litigation and the claimant's burden of proof. If no loss can be established, then none will be awarded. Therefore we recommend that the list of claimants in s.645 of the *Canada Shipping Act* be expanded to include siblings, common law partners, registered domestic partners, and persons in a relationship of emotional interdependence with the deceased or injured person that was of primary importance to each other's lives. The breadth of the latter portion of this suggested definition reflects the view that a "living together" requirement would unnecessarily restrict the objectives of the relational claim. The loss suffered on the death or injury of "best friends" may be as devastating as the loss of a spouse or partner. The phrase "of primary importance in each other's lives" is intended to prevent claims being brought by multiple "best friends". We are also suggesting that economic interdependence should not be a necessary attribute of the non-conjugal relationships embraced by this provision. This is because one objective is to compensate for the loss of future emotional support, whether or not it is accompanied by a loss of future financial support.

6. Preventing violence or abuse in Adult Personal Relationships

Section 215 of the *Criminal Code*

The offence of failing to provide the necessaries of life set out in s.215 of the *Criminal Code* aims to protect the most vulnerable persons in society from neglect that threatens their lives or health. In our view, there is little doubt that the offence pursues a legitimate state objective.[478] However, it is equally clear that the scope of the offence needs to be revised to bring it into line with modern relational realities and expectations. The law has remained substantially unaltered since its

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[478] See the comments of LaForme J. in *Middleton*, *supra* note 243 at paras 54 and 56 ("it does not stretch the imagination to know that in most relationships one or more persons within it will be vulnerable and require the protection of s.215(4)(a)... it is well documented as an area of pressing and substantial concern in Canada which has been recognized by our courts time and time again."

enactment in 1892.[479] As LaForme J. commented in a decision finding that the provision violated the equality rights in s.15 of the *Charter*, "this law, as opposed to its purpose, is antiquated and is in serious need of consideration by Parliament if it is to address present needs and concerns."[480]

The *Charter* violation considered by LaForme J. was the exclusion of common law spouses from the offence. Parliament will have rectified this omission with the passage of Bill C-23. Nevertheless, problems in the definition of the offence remain. In our view, s.215 needs to be redrafted to capture spousal and partnership relationships in a narrower range of circumstances, and to capture a broader range of dependency relationships.

The duty to provide necessaries will read as follows if the *Modernization of Benefits and Obligations Act* comes into force:

> 215. (1) Every one is under a legal duty (a) as a parent, foster parent, guardian or head of a family, to provide necessaries of life for a child under the age of sixteen years; (b) to provide necessaries of life to his spouse or common law partner; and (c) to provide necessaries of life to a person under his charge if that person (i) is unable, by reason of detention, age, illness, mental disorder or other cause, to withdraw himself from that charge, and (ii) is unable to provide himself with necessaries of life.

Section 215(2) provides that it is an offence to fail to provide necessaries of life to a child, spouse or common law partner who "is in destitute or necessitous circumstances" or whose life or health is endangered by the breach of duty. It is also an offence to fail to provide necessaries to a wholly dependent person under one's charge if the failure endangers the life or health of that person.

In our view, the current provision is poorly tailored to the purpose of protecting wholly dependent persons from serious forms of relational neglect in two ways. First, it is premised on an outdated assumption of spousal dependency or helplessness. It is inconsistent with modern assumptions to require spouses to assume responsibility for each other's care regardless of the existence of cohabitation. Section 215 reflects the older legal paradigm in which "husbands were under a duty to support their wives and provide for their necessaries during and (in the case of

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[479] See Don Stuart, *Canadian Criminal Law* 3rd ed. (Toronto: Carswell, 1995) at 88.

[480] *Middleton, supra* note 243 at para. 54.

separation) after a marriage. The logic of support was simple. Marriage gave the husband power and property and made the wife correspondingly dependent. The dependence gave rise to a support obligation on the part of the husband toward the wife."[481] Now, it is not marital status itself, but the nature of the relationship and the expectations that may reasonably flow from it that give rise to an obligation of spousal support.[482] If this is true in family law, it should be all the more so in the context of legal obligations enforced through criminal prohibitions where deprivations of physical liberty are at stake.

It follows, in our view, that the duty to provide necessaries should extend to spouses, common law partners and registered partners who are cohabiting, but should not be imposed on them if they are no longer living together. Otherwise the law will hearken back to the discredited view that relational status *per se* should give rise to legal obligations of support. On the other hand, if persons are living together after having expressed their commitment to each other through marriage or registered partnership, or have been living together in a conjugal relationship for at least a year, then it is indeed a fundamental moral failure to endanger the lives of their spouses or partners by not taking reasonable steps to provide them with food, clothing, shelter or medical care.

At the same time, s.215 captures too narrow a range of dependency relationships. The duty is currently limited to persons who have a wholly dependent person "under their charge". This wording will capture custodians or institutional caregivers, such as prison officials or nurses, but it is an inapt expression for capturing the range of relationships than can give rise to extreme forms of vulnerability.[483] The Law Reform Commission of Canada proposed in 1986 that the duty should

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[481] *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 at para. 23 per McLachlin J. (as she then was).

[482] *Ibid.* at para.44. The *Bracklow* decision supports the now well-established notion that spousal support obligations should no longer attach to marital status *per se*. Justice McLachlin's approach in *Bracklow*, however, can be criticized for failing to effectively displace this older paradigm of presumed dependency and automatic marital obligations. By imposing spousal support obligations in relationships of relatively short duration and limited interdependence, there is in fact very little distance between her approach and an approach based on marital status *per se*.

[483] See, Stuart, *supra* note 479 at 90 ("Section 215 is arbitrary and creates anomalies.").

apply to "other family members living in the same household" or "anyone under [a person's] care", as follows:

> Everyone has a duty to take reasonable steps, where failure to do so endangers life, to:
> (i) provide necessaries to
>
> (A) his spouse;
> (B) his children under eighteen years of age;
> (C) other family members living in the same household, or
> (D) anyone under his care
>
> if such person is unable to provide himself with necessaries of life.[484]

We believe that, with appropriate refinements, this is a sound proposal for a revised s.215.[485] Arguably the offence should apply to serious endangerment of health as well as life, as is the case with the current offence. The closing language, which qualifies all of the relational duties created by the proposed section, makes clear that the purpose of the offence is to protect wholly dependent persons from serious neglect by the persons on whom they are dependent. It thus abandons the assumption of dependency accompanying any particular relational status that was the basis for the original duty imposed on husbands.

We would suggest that the words "his spouse" in the Commission's 1986 proposal be changed to "his or her spouse, common law partner or registered partner living in the same household." This brings the relational definitions into line with Bill C-23's approach and our suggestion that a registered domestic partnership scheme be enacted for the purposes of federal statutes. It is necessary to add a "living together" requirement to the duty owed by spouses and partners to each other, since it is inconsistent with contemporary expectations to impose such a duty upon the separation of spouses or partners.

Rather than use the phrase "family members living in the same household", we would suggest that the duty extend to "domestic relations living in the same household". In this way, the

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[484] Law Reform Commission of Canada, Report on Recodifying Criminal Law, Volume 1 (Report 30) (1986) at 16. See also Law Reform Commission of Canada, Omissions, Negligence and Endangering (Working Paper 46) (1985) at 12-5.

[485] For a thoughtful analysis of these issues that points to similar conclusions, see Andrew Ashworth, "The Scope of Criminal Liability for Omissions", (1989) 105 L.Q.R. 424.

duty will extend not only to relatives by blood, marriage, partnership or adoption. It will also extend to other cohabitants in an economically and emotionally dependent relationship. And, finally, the phrase "under his [or her] care" is appropriate because the duty ought to extend to institutional custodians or caregivers *and* to persons who find themselves temporarily in circumstances where another person's life or health is in their hands.[486]

7. Restructuring Financial Arrangements on the Break down of Relationships of Caring and Commitment

(a) Family support obligations

Bill C-23 does not affect the law of divorce. As a result, only formerly married couples will be included within the corollary relief provisions of the *Divorce Act*. Couples who cohabit outside of marriage, and non-conjugal couples who might also need assistance in the restructuring of their financial relationships on relationship break down, are not covered by the federal *Divorce Act*. These relationships may also be characterized by economic interdependency, and may also confer economic advantages and disadvantages to the parties. When these relationships break down, an argument can be made that an individual who has conferred economic advantages on the other party should also be entitled to compensation for the disadvantages that he or she has incurred. While opposite-sex conjugal couples may access provincial support regimes, same-sex couples only have access in some provinces, and non-conjugal relationships are not generally included within provincial support regimes.[487]

However, as discussed in the previous section, the federal government possesses limited constitutional jurisdiction to legislate in this area. When the federal government has passed

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[486] As in, for example, the famous case of *People* v. *Beardsley*, (1907) 113 N.W. 1128, where the Supreme Court of Michigan acquitted a man charged with manslaughter for failing to secure medical attention for the woman with whom he was having an extra-marital relationship. The Court concluded that "no such legal duty as exists in law and is due from a husband towards his wife" was owed by Beardsley to his lover even when she was unconscious and in his care after ingesting a large quantity of morphine.

[487] There are provisions for support obligations of adult children for their parents in some provincial legislation. See for example section 32 of the Ontario *Family Law Act*.

legislation that deals with the rights and responsibilities of common law partners, it has done so as an incidental aspect of its jurisdiction in relation to some other federal constitutional matter, such as immigration, pensions, and taxation. The federal government has no independent power to legislate in relation to spousal and child support obligations, custody of and access to children, and the division of property. Rather, federal legislation in relation to these matters is valid only as an incidental aspect of federal jurisdiction in relation to the formation and termination of marital relationships.[488] As we suggested above, it might be possible to argue that the federal jurisdiction in relation to marriage and divorce needs to evolve to reflect the demographic and normative transformations in the ways that individuals live in conjugal relationships. If the federal government's jurisdiction over marriage and divorce was interpreted as including jurisdiction in relation to conjugal couples, then this jurisdiction could include corollary relief issues – spousal and child support, child custody and access. Notwithstanding the "living tree" principle of constitutional interpretation, it is not likely that the courts would interpret the words "marriage" and "divorce" so broadly as to be capable of supporting laws that deal with matters such as support obligations. Further, the federal government could have no jurisdiction to deal with the support obligations of non-conjugal relationships. These are matters that clearly fall outside federal jurisdiction in relation to marriage and divorce and within exclusive provincial jurisdiction in relation to property and civil rights in the province.

As discussed in the previous section, the federal government does have jurisdiction to change the definition of marriage to include same-sex couples, who could then be included in the corollary provisions of the *Divorce Act,* in relation to spousal support, child support, and child custody and access.

(b) Enforcement of Family Support Obligations

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[488] Section 91(26) of the *Constitution Act, 1867* gives Parliament jurisdiction to pass laws in relation to "marriage and divorce".

The federal statutes with provisions for the enforcement of family support obligations are drafted broadly to include persons with support obligations. The *Garnishment, Attachment and Pension Diversion Act*[489] provides for garnishment and attachment of federal salaries, as well as the diversion of pension benefits from federal sources to satisfy financial support orders, including any support order made under the *Divorce Act*, or any provincial law relating to family support obligations. The superannuation statutes similarly allow for pensions, annuities or amounts otherwise payable under the statutes to be diverted to satisfy financial support orders in accordance with the *Garnishment, Attachment and Pension Diversion Act.*[490] The *Family Orders and Agreements Enforcement Assistance Act*[491] provides for the release of information that may assist in locating persons in default of their support orders, as well as for the garnishment and attachment of federal moneys to satisfy these orders, and the denial of federal licenses. The statutes are as broad as the support obligations themselves – they include family support obligations under either federal or provincial law.[492] As such, the breadth of these enforcement provisions are directly related to the breadth of these support obligations. To the extent that provincial law includes common law opposite-sex couples, same-sex couples and/or other dependant relationships within their provisions for support, then these family support obligations will be included with the enforcement provisions of these federal statutes. Any question of extending the coverage to other adult relationships not currently included, such as 'a domestic relationship' or 'a close personal relationship between persons who are not relatives' is more appropriately a question for the law of

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[489] R.S.C. 1985, c. G-2.

[490] These include the *Canadian Forces Superannuation Act* R.C.c.C-17,1992, c.46, *Diplomatic Service (Special) Superannuation Act*, the *Lieutenanat Governors Superannuation Act, Public Service Superannuation Act, Royal Canadian Mounted Police Superannuation Act, the Judges Act and the Governor's General Act.*

[491] R.S.C. 1985, c.4 (2nd Supp.).

[492] For example, the *Family Orders and Agreements Enforcement Assistance Act* defines "support order" in section 23 for the purpose of garnishment under Part II as "an order or judgment for maintenance, alimony or family financial support that is enforceable in any province." Section 32 of the Garnishment, Attachment and Pension Diversion Act defines "financial support order" as "an order or judgment for maintenance, alimony or support, including an order or judgment for arrears of payments, made pursuant to the *Divorce Act*, 1970 or the *Divorce Act* or pursuant to the laws of a province relating to family financial support or the enforcement of family financial support".

support obligations (provincial and federal) as discussed in the section above. If the law of support obligations was extended beyond its current scope (married spouses, common law opposite-sex partners, and in some provinces, same-sex partners, and adult children in relation to their parents) to include other familial or non-familial relationships, the federal enforcement provisions could and should apply. [493]

(c) Division of Pensions on Relationship Break Down

The *Canada Pension Plan Act, Pension Benefits Division Act* and the *Pension Benefits Standards Act* provide for a division of pension earnings between spouses and common law partners when the relationship breaks down. Bill C-23, by including common law partners within these provisions, recognizes that these relationships constitute economic partnerships, thereby entitling the parties to share in the wealth generated during the relationship on relationship break .down.

However, non-conjugal relationships are not covered by these statutes for the purposes of division of pension entitlements. There is no recognition that non-conjugal relationships may be characterized by economic interdependency, and no provision for the sharing in the wealth generated during these relationships if and when these relationships break down. The question to be addressed in evaluating this exclusion is whether these relationships ought to be recognized as economic partnerships, or whether there is a legitimate reason for their exclusion.

While little consideration has been given to this exclusion in public policy debates, its defence would lie in the argument that non-conjugal relationships are qualitatively different from conjugal relationships. More specifically, the argument would focus on the differences in commitment, and the reasonable expectations of the parties. Non-conjugal relationships might be

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[493] As currently drafted, these federal enforcement provisions could apply to any extension of the support obligation to other family relationships. The current drafting, however (which focuses on "family support obligations"), might require a small amendment if the scope of support obligations was extended to non-familial relationships (unless 'family' was retained as a non-technical term, as suggested for example in the British Columbia Law Institute's proposed *Family Status Recognition Act*).

said to not give rise to the same expectation of long-term commitment and mutual support. On the break down of these relationships, then, there would be no expectation of continued financial support, nor of sharing in the wealth generated during the relationship. The argument could also rely on the exclusion of non-conjugal relationships from virtually all provincial family property regimes.

In contrast, the argument in favour of inclusion would argue that non-conjugal relationships may well involve the pooling of economic resources akin to the economic partnership model of marriage, and may well involve the assumption of mutual support obligations. While not all non-conjugal relationships would be characterized by economic interdependency, the blanket exclusion of all these couples with no ability to opt in to the private rights and responsibilities could be argued to be too broad. At least some of the non-conjugal relationships do structure their relationships as a economic partnership, and would be in a similar position as conjugal couples on the break down of their relationships. The inability of the individuals within these relationships of economic interdependency to share in any of the wealth generated by the relationship arguably lacks a rational connection to the objectives of state legislation.[494]

One approach to inclusion of non-conjugal relationships for the purposes of pension division would be by way of a registered domestic partnership regime. Individuals in non-conjugal relationships could register their relationships, and thereby be entitled to the division of pension earnings within these federal statutes. Inclusion would then only involve those individuals who have chosen to designate their relationships as domestic relationships. It would be done on the basis of self-designation, and would thereby meet most of the objections to the inclusion. Individuals with a long-term commitment and with an expectation of sharing in the wealth generated by the partnership would be included.

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[494] While most of the issues of division of property fall within provincial jurisdiction, the division of unadjusted federal pensions does fall squarely within federal jurisdiction, and federal law could be amended to include these relationships.

The more difficult question is whether individuals in non-conjugal relationships who have not registered their relationships as a domestic partnership should ever be included for the purposes of pension division. If these individuals are not included through an ascribed relational status, there would be a serious possibility of under-inclusiveness – some individuals may have a long term commitment and an expectation to share in the wealth of the relationship, but do not register their relationship, and would thereby be excluded. However, an ascribed relational status creates its own risks, including a risk of over-inclusiveness. Ascribing relational status to non-conjugal cohabitants who have not designated their relationships as domestic partnerships would risk including a range of individuals who never intended to share in the wealth of the relationship.[495] It would thereby risk undermining the value of relational autonomy. Further, ascribing such relational status to non-conjugal couples for the purposes of pension division would go well beyond the kind of division of property on relationship break down contemplated within provincial family law schemes, where the law remains reluctant to even ascribe *spousal* status.[496]

It might be possible to ascribe relational status in a manner that establishes an appropriate threshold for claims to division of pensions on relationship break down. In New South Wales for examples, individuals in a domestic relationship may make an application for division of property on relationship break down. But, the entitlement is not automatic – rather, the statute gives the courts the discretion to make such orders as seem to the court just and equitable, having regard to the contributions of the parties (both financial and non-financial). [497] However, in our view, the risks of adding a definition of domestic partner to these provisions allowing for a division of benefits on relationship break down outweighs the benefits. At this stage, the best option for responding to the

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[495] The definition for ascribed relational status, emphasizing joint residence with emotional and economic interdependency might go some distance to only including those relationships with such reasonable expectations of sharing in the wealth of the relationship.

[496] Notwithstanding the fact that many law commission reports have recommended that these common law relationships be included within provincial division of property regimes. See Ontario Law Reform Commission, *supra* note 420, and the British Columbia Law Institute. See also *Walsh* v. *Bona supra* note 320 holding that the exclusion of these common law couples violates the Charter.

[497] Section 20, *De Facto Relationship Act* 1984 N.S.W.

legitimate claims of non-conjugal cohabitants is to put in place a registered domestic partnership scheme, and then add registered partners to the provisions of the *Canada Pension Plan Act*, the *Pensions Benefits Division Act* and the *Pension Benefits Standards Act*.

8. Conclusion

As we have seen, the scope of federal legislation governing adult personal relationships has steadily expanded over the past thirty years. In undertaking this expansion, Parliament has been driven largely by its desire to bring legislation into line with the requirements of formal legal equality. Law reform has come in three stages.

The first stage, characteristic of the early to mid-1970s, was a result of a drive to achieve formal sex equality. Gender-specific statutory provisions were expunged from the statute books. Rights and responsibilities that formerly could be claimed only by women or only by men were now possessed by men and women alike. Of course, behind the surface appearance of gender equality, a deeply gendered reality remained. One of the difficulties of accurately describing the contemporary roles of federal statutes is that their gender-neutral surface alters and obscures their original gendered objectives. The particular importance, for example, of pension survivors' benefits or the old age spousal allowances to elderly women is not a matter of historical interest only.

The second and third stages have resulted from Parliament's desire to eliminate discrimination on the basis of marital status and sexual orientation respectively. The normative and legal commitment to formal equality required that functionally equivalent relationships be treated equally under the law. The second stage brought persons of the opposite sex within the legal category of spouse if they lived together outside of marriage in relationships that were functionally equivalent to marriage. This second stage elimination of marital status discrimination proceeded haltingly from the 1950s through the 1990s. Common law opposite-sex couples were added to federal pension and tax laws. Systematic progress did not occur until this year, with the expected

passage of Bill C-23. Soon unmarried opposite-sex couples will have the same rights as married couples in the vast majority of federal statutes.

In comparison, the third stage elimination of sexual orientation discrimination has advanced remarkably quickly. The process that began in 1999 in employment pension statutes will soon be largely complete with the passage of Bill C-23. The *Modernization of Benefits and Obligations Act* will expand the application of federal relational statutes to include same-sex couples, along with unmarried opposite-sex couples, under the new label of common law partners. The second and third stages of reform will be complete if the exclusion of unmarried conjugal relationships from a handful of important statutes is addressed by Parliament, and if the same-sex marriage bar is removed. We argued that the remaining statutory anomalies - including the *Immigration Act*, the *Canada Evidence Act* and the *Canada Shipping Act* - need to be eliminated. There is no longer any compelling justification for the exclusion of conjugal couples from the full range of federal statutes imposing relational benefits and obligations. The inclusion of conjugal couples can be advanced in two ways. First, those conjugal couples who are currently excluded from marriage - that is, same-sex couples - ought to be given an opportunity to opt in to conjugal status. A government committed to the values of equality and autonomy in intimate relationships ought to amend the definition of marriage to include same-sex couples. However, given the continuing political resistance to this option, at a minimum, the federal government ought to enact a registered domestic partnership scheme that allows same-sex couples (among others) to opt into a new civil status entitling them to the full range of federal rights and responsibilities extended to spouses.

These three stages of law reform designed to eliminate discrimination on the basis of sex, marital status and sexual orientation have been the focus of Parliamentary attention to relational statutes for several decades. The pattern has been to add a new layer of individuals or relationships to the existing legislative schemes. In our view, this process of law reform by accretion has not resulted in a serious interrogation of two questions that ought to give rise to fourth and fifth stages of law reform in this area. The first is whether the underlying objectives of relational statutes remain

legitimate. The second is whether relationships that lack a sexual component - and therefore may not qualify as conjugal - ought to qualify for inclusion in a broader range of federal statutes.

Our review of federal legislation led us to conclude that there are in essence two legitimate relational objectives being pursued by the state: the regulation of the formation and dissolution of relationships, and the regulation of the consequences of relationships characterized by emotional intimacy and economic interdependence. We discovered that the remarkable diversity of federal statutes employing adult relational terms can be allocated to one or the other of these objectives. In our view, these are both important state objectives. We have not called their legitimacy into question. In most federal contexts, therefore, the issue is not whether relational objectives should be abandoned. Rather, it is the scope of these laws - how they should define the relevant relationships to which they should apply - that is at issue. Our analysis did identify a number of federal statutes that employ relational terms in a manner that is no longer compelling or necessary to the pursuit of the two valid relational objectives. The rules regulating spousal competence and compellability in criminal trials, the monthly allowance in the *Old Age Security Act*, and the definitions of insurable employment in the *Employment Insurance Act* are examples of federal laws that do not promote legitimate relational objectives. We have suggested that these statutes should be amended to remove relational terms altogether. Our analysis also indicates that a number of relational statutes need to be updated to abandon outdated assumptions. Some statutes based on assumptions of married women's economic dependency, for example, have never been seriously re-examined. They have simply been expanded to include individuals without discrimination on the basis of gender, marital status or sexual orientation. The repeal and refinement of outdated relational statutes is a fourth stage of law reform that remains to be accomplished (and needs to be accomplished on an ongoing basis).

Our report also seeks to advance the conversation about the situation of non-conjugal cohabitants. This group lacks a coherent identity. Their interests are not advanced by advocacy organizations, nor has anti-discrimination law placed their issues on the legislative agenda. It is not

clear whether living in a non-conjugal relationship is a ground of discrimination prohibited by human rights statutes or the guarantee of legal equality in the Charter of Rights and Freedoms. These differences in the political and legal resources available to non-conjugal cohabitants may help explain their marginalized position in federal statutes. The question of principle that remains, however, is whether these relationships have functional attributes worthy of greater recognition in federal statutes. Non-conjugal relationships are currently included in a limited number of federal statutes, in a manner that appears arbitrary and inconsistent. Moreover, with several notable exceptions, the inclusion of non-conjugal relationships is limited to individuals living in a household with others connected by recognized familial relationships, that is, by connections of blood, marriage, adoption or, after Bill C-23, common law partnership. Bill C-23 does not deal with non-conjugal relationships generally, and thus, does nothing to remedy the perfunctory nature of the treatment of non-conjugal relationships in current federal legislation.

In our view, a detailed examination of the objectives underlying many federal statutes yields the conclusion that there are compelling reasons to include many persons living in non-conjugal relationships of dependence or interdependence in federal laws. We are of the view that the best option for inclusion is through the enactment of a registered domestic partnership scheme, which would allow individuals in non-conjugal relationships to opt into the full package of relational rights and responsibilities in federal legislation. A domestic partnership regime would advance all of the fundamental values animating the regulation of adult relationships of caring and commitment: equality, autonomy, security and privacy. Individuals could choose the status of their relationships, and have this choice respected in law without undue intrusion into the intimate details of their lives.

The more difficult, and contentious issue is whether relational status should be ascribed to individuals in non-conjugal relationships who do not opt into a domestic partnership scheme. Ascribing relational status to individuals who have not opted in runs the risk of undermining the values of autonomy and reasonable expectations, by imposing rights and responsibilities never contemplated by the parties. However, as we have tried to highlight, this is not an entirely novel

issue – federal legislation does currently ascribe relational status, and impose some rights and responsibilities to individuals in non-conjugal relationships through such concepts as dependant, associate and related persons. But, this is not an issue that can in any way be answered in the abstract. Rather, as we have insisted, the inclusion of these relationships can only be evaluated on a statute by statute, provision by provision basis. There is, in some circumstance, a compelling case to be made for inclusion.

For example, we argued that there is a strong argument for broadening the inclusion of non-registered, non-conjugal relationships in immigration law. The category of 'family class' already includes a broad range of non-conjugal relationships, but does not allow for sponsorship of individuals who are not related to each other. Given the seriousness of the sponsorship obligations – including the potential for long term financial support – individuals ought to be given an opportunity to decide for themselves who is sufficiently important to them (within the limits of a test for emotional interdependency), and to voluntarily undertake responsibility for that person. In this sense, the recognition of a broader range of relationships would be entirely consistent with the value of relational autonomy.

Similarly, we are of the view that domestic relationships of emotional intimacy and economic interdependency should be included within the privilege that attaches to private communications in the *Canada Evidence Act*. As for statutes concerned with the potential existence of shared economic interest in interdependent relationships, we concluded that a compelling case can be made for including domestic relationships, provided that presumptions against fair dealing between the parties are made rebuttable. In our consideration of statutes tailoring financial benefits and penalties to recognize the consequences of relationships of economic dependence or interdependence, we argued that there is a strong case to be made for including a broader range of domestic relationships in the rules for determining eligibility for the guaranteed income supplement of the *Old Age Security Act*. We argued that the current system needs to be revised so that the gap between single and cohabitant rates is reduced and the presumptions regarding pooled income

made rebuttable. These refinements are necessary to ensure that the scheme does not have the perverse consequence of discouraging the formation of relationships of caring and commitment. With these revisions in place, we argued that the statute can more effectively target need by including a broad range of domestic relationships in its eligibility rules.

In the context of compensation for the loss of future economic or emotional support, there is again a strong case to be made for defining the range of potential claimants broadly. For example, we argued that including unregistered, non-conjugal relationships within s. 646 of the *Canada Shipping Act* does no more than entitle an individual with the right to try to prove such a loss through the introduction of evidence in a court proceeding. If no loss can be established, then none will be awarded. Finally, in the context of preventing violence or abuse in adult personal relationships, we were similarly of the view that it was entirely appropriate to include unregistered, non-conjugal relationships within the ambit of section 215 of the *Criminal Code* dealing with the necessities of life.

However, there are other legislative contexts in which we believe that it would be less appropriate to ascribe relationship status to individuals in non-registered, non-conjugal relationships. Survivors' benefits and division of pension earnings on relationship break down in pension legislation are two examples of legislative contexts in which we believe that it would not be appropriate to ascribe relationship status through a definition of domestic relationship. In these contexts, the administrative complexities, the problems of overbreadth, and the risks to relational autonomy outweigh the advantages of inclusion. It is quite possible that this conclusion could change over time, as more and more non-conjugal relationships come to be included in the web of federal legislation, creating a different and higher set of expectations amongst individuals within these relationships. However, at this stage, the best option would be to create a means by which individuals in these relationships could opt to have their relationships recognized (domestic partnership registration), allowing these individuals to choose to be included within these statutory provisions.

In returning then, to the scenario with which we began – of the two individuals who have lived together for 15 years in a close emotional and economic relationship of caring and commitment – the question of their inclusion in the web of federal legislation can only be answered conditionally and contextually. If they have chosen to express their commitment to care for each other through marriage or registered partnership, then, yes, they should be included in all federal relational statutes. If they have lived together in a conjugal relationship for at least a year, after Bill C-23 they will be included in the vast majority of federal statutes as common law partners. But what if they have not chosen to formalize their non-conjugal relationship through registered partnership or marriage? Should their relationship nevertheless be included in rules regulating conflict of interests? Yes, provided that the rules allow assumptions of shared economic interests to be rebutted. Should they have a legal obligation to provide for one another? It depends. For the purposes of criminal sanctions of failing to provide the necessaries of life? Yes, if they still live together and one is wholly dependent on the other. On relationship break down? Yes, if they are married. If they are common law partners, registered partners, or living in a domestic relationship, the answer is likely well beyond the scope of federal jurisdiction. Should the state provide financial relief if their household income is suddenly diminished as a result of disability, retirement or death? In many cases the answer is no since the group of unregistered non-conjugal cohabitants is too diverse to justify broad presumptions of dependence or interdependence. The answer might be yes if the nature of the statutory scheme enables the isolation of situations - through an adjudicative or administrative process - where a real relational loss has occurred.

What is clear is that the answers to these questions can no longer be answered simply by whether or not the individuals were married. Marriage is no longer an appropriate proxy for marking those relationships deserving of legal recognition. Nor can the question be answered simply by reference to whether or not they are living in a marriage-like or conjugal relationship. The question of the appropriate scope for the legal regulation of adult personal relationships now requires a far more complex series of inquiries into the objectives and assumptions of the statutory provisions.

Moreover, the distinction between conjugal and non-conjugal relationships is becoming less and less clear, and can no longer serve as the basis for determining entitlements and obligations across the board. Rather, as we have argued throughout this paper, federal statutory provisions need to be examined on a statute by statute, objective by objective basis. And there is a compelling case to be made in many contexts to expand the scope of federal regulation to include non-conjugal couples.

Finally, it is important to emphasize that the process of rethinking federal legislation, and expanding the scope of federal regulation is precisely that – a process. And as such, the process is likely to be evolutionary. The inclusion of non-conjugal relationships in some legislative contexts and not others will no doubt have to be re-evaluated in the future. Much like the progressive inclusion of conjugal couples within federal legislation, it may well be that in the future, the values of equality, autonomy, privacy and security will require a more complete inclusion. Or perhaps not. The legal regulation of non-conjugal relationships remains relatively uncharted territory, and there is little reason to believe that the conclusions reached today will withstand, without further amendment, the test of time.

BIBLIOGRAPHY

BOOKS / MONOGRAPHS

Advisory Committee to the Immigration Legislative Review, *Not Just Numbers: A Canadian Framework for Future Immigration* (Ottawa: Citizenship and Immigration Canada, 1997).

Australian Capital Territory, Attorney General's Department, *A Proposal for Domestic Relationship Legislation in the ACT* (Discussion Paper, Canberra, 1993).

Baker, M., ed., *Canada's Changing Families: Challenges to Public Policy* (Ottawa: The Vanier Institute of the Family, 1994).

Baker, M., ed., *Families: Changing Trends in Canada*, 3rd ed. (Toronto: McGraw-Hill Ryerson Limited, 1996).

Barrett. M., & MacIntosh, M., *The Anti-Social Family*, 2nd ed. (New York: Verso, 1991).

Beck, U., & Beck-Gernsheim, E., *The Normal Chaos of Love* (Cambridge: Polity Press, 1995).

Bernardes, J., *Family Studies: An Introduction* (London: Routledge, 1997).

Boswell, J., *The Marriage of Likeness: Same-Sex Unions in Pre-Modern Europe* (London: Fontana Press, 1995).

British Columbia Law Institute, *Report on the Recognition of Spousal and Family Status* vol. 5 (Vancouver: British Columbia Law Institute, 1998).

Canada, *Equality for All: Report of the Parliamentary Committee on Equality Rights* (Ottawa: Queen's Printer, 1985) (Chairman: J.P. Boyer, M.P.).

Canada, *Toward Equality: The Response to the Report of the Parliamentary Committee on Equality Rights* (Ottawa: Minister of Supply and Services Canada, 1986).

Carrington, C., *No Place Like Home: Relationships and Family Life Among Lesbians and Gay Men* (Chicago: The University of Chicago Press, 1999).

Cavan, R.S., ed., *Marriage and Family in the Modern World: A Book of Readings*, 2nd ed. (New York: Thomas Y. Crowell Company, 1967).

Clulow, C., *Women, Men & Marriage* (New Jersey: Jason Aronson Inc., 1996).

Coontz, S., *Social Origins of Private Life: A History of American Families, 1600-1900* (New York: Verso, 1988).

Coontz, S., *The Way We Never Were: American Families and the Nostalgia Trap* (New York: Basic Books, 1992).

Coontz, S., *The Way We Really Are: Coming to Terms with America's Changing Families* (New York: Basic Books, 1997).

Cossman, B., & Ryder, B., *Gay, Lesbian and Unmarried Heterosexual Couples and the Family Law Act: Accomodating a Diversity of Family Forms* (June 1993). [unpublished, prepared for the Ontario Law Reform Commission]

Dalley, G., *Ideologies of Caring: Rethinking Community and Collectivism*, 2nd ed. (Basingstoke: Macmillan Education, 1996).

Davidoff, L. et al., *The Family Story: Blood, Contract and Intimacy, 1830-1960* (New York: Addison Wesley Longman Limited, 1999).

Dempsey, J.J., *The Family and Public Policy: The Issue of the 1980s* (Baltimore: Paul H. Brookes Publishing Co., Inc., 1981).

Department of Justice Canada, *Equality Issues in Federal Law: A Discussion Paper* (Ottawa: Minister of Supply and Services Canada, 1985).

Duck, S., & Silver, R.C., eds., *Personal Relationships and Social Support* (London: Sage Publications Ltd., 1990).

Eekelaar, J.M., & Katz, S.N., eds., *Marriage and Cohabitation in Contemporary Societies: Areas of Legal, Social and Ethical Change* (Toronto: Butterworths, 1980).

Eekelaar, J.M. and Nhlapo, R.T. eds., *The Changing Family : International Perspectives on the Family and Family Law* (Oxford: Hart Publishing, 1998).

Eichler, M., *Families in Canada Today: Recent Changes and Their Policy Consequences*, 2nd ed. (Toronto: Gage, 1988).

Eichler, M., *Family Shifts: Families, Policies, and Gender Equality* (Toronto: Oxford University Press, 1997).

Equal Opportunity Commission of Victoria, *Same Sex Relationships and the Law* (EOVC, Melbourne, 1998).

Eskridge, W.N., *The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment* (Toronto: The Free Press, 1996).

Eskridge, W.N., *Gaylaw: Challenging the Apartheid of the Closet* (Cambridge: Harvard University Press, 1999).

Estlund, D.M., & Nussbaum, M.C., eds., *Sex, Preference, and Family: Essays on Law and Nature* (New York: Oxford University Press, 1997).

Finch, J., *Family Obligation and Social Change* (Cambridge: Polity Press, 1989).

Fleming, J.G., *The Law of Torts*, 8th ed. (Sydney: Law Book, 1992).

Forder, C., *Models of Domestic Partnership Laws: The Field of Choice* (Feminism and Law Workshop Series, Toronto: Faculty of Law, University of Toronto, 1999).

Gay and Lesbian Rights Lobby, *The Bride Wore Pink* (Sydney: GLRL, 1993), reproduced in (1993) 3 Australasian Gay & Lesbian L.J. 67.

Gay and Lesbian Rights Lobby, *The Bride Wore Pink* (Sydney, GLRL, 2nd ed. 1994); <http://www.rainbow.net.au/~glrl/The_Bride_Wore_Pink.htm>.

Gay and Lesbian Rights Lobby, *Superannuation and Same Sex Relationships* (Sydney: GLRL, 1996).

Harding, L.F., *Family, State and Social Policy* (London: Macmillan, 1996).

Giddens, A., *The Transformation of Intimacy: Sexuality, Love and Eroticism in Modern Societies* (Cambridge: Polity Press, 1992).

Gittins, D., *The Family in Question: Changing Households and Familiar Ideologies*, 2nd ed. (Basingstoke: Macmillan, 1993).

Glendon, M.A., *The Transformation of Family Law: State, Law and Family in the United States and Western Europe* (Chicago: University of Chicago Press, 1989).

Goodsell, W., *A History of Marriage and the Family* (New York: The Macmillan Company, 1974).

Goodwin, R., *Personal Relationships Across Cultures* (New York: Routledge, 1999).

Graff, E.J., *What is Marriage For? The Strange Social History of our Most Intimate Institution* (Boston: Beacon Press, 1999).

Holland, W.H., & Stalbecker-Poutney, B.E., eds., *Cohabitation: The Law in Canada*, looseleaf (Toronto: Carswell, 1990).

Jagger, G., & Wright, C., eds., *Changing Family Values* (New York: Routledge, 1999).

Jamieson, L., *Intimacy: Personal Relationships in Modern Societies* (Cambridge: Polity Press, 1998).

Jolowicz, H.F., *Historical Introduction to the Study of Roman Law*, 2nd ed. (Cambridge: Cambridge University Press, 1952).

Lafollette, H., *Personal Relationships: Love, Identity, and Morality* (Cambridge: Blackwell, 1996).

Lahey, K.A., *Are We Persons Yet? Law and Sexuality in Canada* (Toronto: University of Toronto Press, 1999).

Langford, W., *Revolutions of the Heart: Gender, Power, and the Delusions of Love* (New York: Routledge, 1999).

Law Commission of Canada, *Marriage and Marriage-Like Relationships* by M. Bailey, (Ottawa: Law Commission of Canada, 1999).

Law Reform Commission of Canada, *Omissions, Negligence and Endangering* (Working Paper 46) (Ottawa: The Commission, 1985).

Law Reform Commission of Canada, *Report on Recodifying Criminal Law*, vol.1, (Report 30) (Ottawa: The Commission, 1986).

Law Reform Commission of Nova Scotia, *Final Report: Reform of the Law Dealing with Matrimonial Property in Nova Scotia* (Halifax: Law Reform Commission of Nova Scotia, 1997).

Library of Parliament, *Canada Pension Plan Survivor Benefits* (Background Paper) by M.J. Morton (Ottawa: Library of Parliament, 1987).

Luxton, M., *Feminism and Families: Critical Policies and Changing Practices* (Halifax: Fernwood Publishing, 1997).

Luxton, M., Rosenberg, H., & Arat-Koc, S., eds., *Through the Kitchen Window: The Politics of Home and Family*, 2nd ed. (Toronto: Garamond Press, 1990).

Mee, J., *The Property Rights of Cohabitees* (Oxford: Hart Publishing, 1999).

Mohr, R.D., *Gays/Justice: A Study of Ethics, Society, and Law* (New York: Columbia University Press, 1988).

Morgan, D.H.J., *Family Connections: An Introduction to Family Studies* (Cambridge: Polity Press, 1996).

Muncie, J. et al, eds., *Understanding the Family* (London: Sage, 1995).

National Association of Women and the Law, *Submission of NAWL to the Standing Committee on National Health and Welfare on Survivor Benefits Under the Canada Pension Plan* by G. Brodsky (Ottawa: National Association of Women and the Law, 1987).

National Council of Welfare, *A Pension Primer: A Report by the National Council of Welfare* (Ottawa: Minister of Public Works and Government Services Canada, 1999).

National Council of Welfare, *Pension Reform: A Report by the National Council of Welfare* (Ottawa: Minister of Supply and Services Canada, 1990).

National Health and Welfare, *Survivor Benefits Under the Canada Pension Plan* (Consultation Paper) (Ottawa: Minister of Supply and Services Canada, 1987).
Okin, S.M., *Justice, Gender and the Family* (New York: Basic Books, 1989).

Ontario Law Reform Commission, *Report on the Rights and Responsibilities of Cohabitants Under the Family Law Act* by J. McCamus *et al.* (Toronto: Ontario Law Reform Commission, 1993).

Ontario Social Assistance Review Committee, *Transitions* (Toronto: Ministry of Community and Social Services, 1988).

Queensland Law Reform Commission, *Shared Property: Resolving Disputes Between People Who Live Together and Share Property* (QLRC Discussion Paper no.36, 1991).

Queensland Law Reform Commission, *De Facto Relationships* (Report 44, QLRC, Brisbane, 1993).

Ramu, G.N., ed., *Marriage and the Family in Canada Today*, 2nd ed. (Scarborough: Prentice Hall Canada Inc., 1993).

Richards, D.A.J., *Identity and the Case for Gay Rights: Race, Gender, Religion as Analogies* (Chicago: The University of Chicago Press, 1999).

Richards, D.A.J., *Women, Gays and the Constitution: The Grounds for Feminism and Gay Rights in Culture and Law* (Chicago: University of Chicago Press, 1998).

Scanzoni, J. et al., *The Sexual Bond: Rethinking Families and Close Relationships* (Beverly Hills, CA: Sage, 1989).

Settles, B.H. et al., *Concepts and Definitions of the Family for the 21st Century* (New York: The Haworth Press, Inc., 1999).

Sevenhuijsen, S., *Citizenship and the Ethics of Care: Feminist Considerations on Justice, Morality and Politics* (London: Routledge, 1998).

Seymour, J., & Bagguley, P., eds., *Relating Intimacies: Power and Resistance* (New York: St. Martin's Press, Inc., 1999).

Silva, E.B., & Smart, C., eds., *The New Family?* (London: Sage Publications Ltd., 1999).

Skolnick, A.S., *Embattled Paradise: The American Family in an Age of Uncertainty* (New York: Basic Books, 1991).

Smart, C., & Neal, B., *Family Fragments?* (Cambridge: Polity Press, 1999).

Smith, M., *Lesbian and Gay Rights in Canada: Social Movements and Equality-Seeking, 1971-1995* (Toronto: University of Toronto Press, 1999).

Snell, J.G., *In the Shadow of the Law: Divorce in Canada 1900-1939* (Toronto: University of Toronto Press, 1991).

Strasser, M., *The Challenge of Same-Sex Marriage: Federalist Principles and Constitutional Protections* (Conneticut: Praeger Publishers, 1999).
Strasser, M., *Legally Wed: Same-Sex Marriage and the Constitution* (Ithaca: Cornell University Press, 1997).

Statistics Canada, *Age, Sex, Marital Status and Common-Law Status: 1996 Census Technical Reports* (Ottawa: Industry Canada, 1997).

Statistics Canada, *Canadian Families at the Approach of the Year 2000* by Y. Peron *et al.* (Ottawa: Statistics Canada, 1996).

Statistics Canada, *Marital Status, Common-law Unions and Families: Immigration and Citizenship* (Census 1996) (Ottawa: Statistics Canada, 1997).

Statistics Canada, *Women and the Canadian Labour Market: Transitions Towards the Future* by M. Gunderson (Toronto: Statistics Canada & International Thomson Publishing Nelson, 1991).

Statistics Canada: Housing, Family and Social Statistics Division, *Lone-Parent Families in Canada* by C. Lindsay (Ottawa: Statistics Canada, 1992).

Statistics Canada: Housing, Family and Social Statistics Division, *Women in the Workplace*, 2nd ed. by N.Z. Ghalam (Ottawa: Statistics Canada, 1993).

Statistics Canada: Labour and Household Surveys Analysis Division, *Work Arrangements in the 1990s: Analytic Reports* vol.8 (Ottawa: Statistics Canada, 1998).

Stuart, D., *Canadian Criminal Law*, 3rd ed. (Toronto: Carswell, 1995).

Tronto, J.C., *Moral Boundaries: A Political Argument for an Ethic of Care* (New York: Routledge, 1993).

Ungerson, G., *Gender and Caring: Work and Welfare in Britain and Scandinavia* (London: Harvester Wheatsheaf, 1990).

Ursel, J., *Private Lives, Public Policy: 100 Years of State Intervention in the Family* (Toronto: Women's Press, 1992).

Vanier Institute of the Family, *Profiling Canada's Families* (Ottawa: Vanier Institute of the Family, 1994).

Weston, K., *Families We Choose: Lesbians, Gays, Kinship* (New York: Columbia University Press, 1991).

Wigmore, J.H., *Evidence in Trials at Common Law*, 8th ed. by J.T. McNaughton, J.H. Chadbourn & P. Tillers (Boston: Little, Brown, 1961).

Wintemute, R. and Andenæs, M. eds., *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* (Oxford: Hart Publishing, forthcoming November 2000).

ARTICLES

Anderson, T.G., "Models of Registered partnership and Their Rationale: The British Columbia Law Institute's Proposed Domestic Partner Act" (2000) 17:1 Can. J. Fam. L. 89.

Ashworth, A., "The Scope of Criminal Liability for Omissions" (1989) 105 L.Q. Rev. 424.

Bailey, M., "Hawaii's Same-Sex Marriage Initiatives: Implications for Canada", (1998) 15 Can. J. Fam. L. 153.

Bailey, M., "Private International Law Issues Relating to Registered Partnerships: A Canadian Perspective" (Conference on Domestic Partnerships, Faculty of Law, Queen's University, 21-23 October 1999) [unpublished].

Bala, N., "Alternatives for Extending Spousal Status in Canada" (2000) 17:1 Can. J. Fam. L. 169.

Bala, N., "The Evolving Canadian Definition of the Family: Towards a Pluralistic and Functional Approach" (1994) 8 Int'l J.L. & Fam. 293.

Bala, N. & Cano, M., "Unmarried Cohabitation in Canada: Common Law and Civilian Approaches to Living Together" 4 C.F.L.Q. 147.

Bech, H., "Report From a Rotten State: 'Marriage and Homosexuality in Denmark'" in K. Plummer, ed., *Modern Homosexualities: Fragments of Lesbian and Gay Existence* (New York: Routledge, 1992) 134.

Boyd, S.B., "Expanding the Family in Family Law: Recent Ontario Proposals on Same Sex Relationships" (1994) 7 C.J.W.L. 545.

Boyd, S.B., "Best Friends or Spouses? Privatization and the Recognition of Lesbian Relationships in *M. v. H.*", (1996) 13 Can. J. Fam. L. 321.

Boyd, S.B., "Family, Law and Sexuality: Feminist Engagements", (1999) 8 Soc. & Legal Studies 369.

Chambers, D.L., "What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples" (1996) 95 Mich. L. Rev. 447.

Colker, R., "Marriage", (1991) 3 Yale J.L. & Feminism 321.

Davies, C., "The Extension of Marital Rights and Obligations to the Unmarried: Registered Domestic Partnerships and Other Methods", (2000) 17 Can. Fam. L.Q. 247.

Dupuis, M.D., "The Impact of Culture, Society and History on the Legal Process: An Analysis of the Legal Status of Same-Sex Relationships in the United States and Denmark" (1995) Int'l J.L. & Fam. 86.

Eekelaar, J., "Registered Same Sex Partnerships and Marriages – A Statistical Comparison", (1998) 28 Family Law 561.

Ettelbrick, P., "Wedlock Alert: A Comment on Lesbian and Gay Family Recognition", (1996) 5 J.L. & Policy 107.

Freeman, J., "Defining Family in *Mossop v. DSS*: The Challenge of Anti-Essentialism and Interactive Discrimination for Human Rights Litigation" (1994) 44 U.T.L.J. 41.

Fried, C., "Privacy" (1967-68) 77 Yale L.J. 475.

Feldman, D.J., "Privacy-Related Rights: Their Social Value" in P. Birks, ed., *Privacy and Loyalty* (Oxford: Clarendon Press, 1997) 15.

Gavigan, S.A., "Paradise Lost, Paradox Revisited: The Implications of Familial Ideology for Feminist, Lesbian and Gay Engagement to Law", (1993) 31 Osgoode Hall L.J. 589.

Gavigan, S.A., "Legal Forms, Family Forms, Gendered Norms: What is a Spouse?" (1999) 14 Can. J.L. & Society 127.

Gilchrist, E., "Superannuation, Discrimination and Same Sex Couples", (1999) 8 Australasian Gay & Lesbian L.J. 57.

Graycar, R. & Millbanks, J., "The Bride Wore Pink ... To the *Property (Relationships) Legislation Amendment Act 1999*: Relationship Law Reform in New South Wales" (2000) 17:1 Can. J. Fam. L. 227.

Hafen, B., "The Family as an Entity", (1989) 22 U.C. Davis L. Rev. 865.

Henson, D., "A Comparative Analysis of Same-Sex Partnership Protections: Recommendations for American Reform" (1993) 7 Int'l J.L. & Fam. 282.

Holland, W., "Cohabitation and Marriage - A Meeting at the Crossroads?" (1990) 7 C.F.L.Q. 31.

Holland, W., "Intimate Relationships in the New Millennium: The Assimilation of Marriage and Cohabitation?" (2000) 17:1 Can. J. Fam. L. 114.

Horster, H.E., "Does Portugal Need to Legislate on De Facto Unions?", (1999) 13 Int'l J.L. Pol. & Fam. 274.

James, S.A., "'As If They Were Husband and Wife': A Critique of De Facto Relationship Property Law in Victoria", (1997) 15 Law in Context 53.

Jamieson, L., "Intimacy Transformed? A Critical Look at the Pure Relationship" (1999) 33:3 Sociology 477.

Karst, K.L., "The Freedom of Intimate Association" (1980) 89 Yale L.J. 624.

Knopff, R., "The Case for Domestic Partnership Laws" (June 1999) 20 Policy Options 53.

Lodrup, P., "Registered Partnership in Norway" in A. Bainham, ed., *The International Survey of Family Law* (Th Hague, Netherlands: Martinus Nijhoff, 1994).

Lund-Anderson, I., "Moving Towards the Individual Principle in Danish Law" (1990) 4 Int'l J.L. & Fam. 328.

McCarthy, M.A. & Radbord, J.L., "Family Law for Same Sex Couples: Chart(er)ing the Course" (1998) 15:2 Can. J. Fam. L. 101.

Middleton, S. and Otlowski, M., "De Facto and Other Significant Relationships – Possible Tasmanian Directions for Reform", (1998) 13 Australian J. Fam. L. 25.

Millbank, J., "If Australian Law Opened Its Eyes to Lesbian and Gay Families, What Would It See?", (1998) 12 Australian J. Fam. L. 99.

Millbank, J., "The De Facto Relationshiops Amendment Bill 1998 (NSW): The Rationale for Law Reform", (1999) 8 Australasian Gay & Lesbian L.J. 1.

Millbank, J., "The *Property (Relationships) Amendment Act 1999* (N.S.W.) versus the De Facto Relationships Amendment Bill 1998 (N.S.W.)", (1999) 9 Australasian Gay & Lesbian L.J. 1.

Minow, M., "All in the Family and In All Families: Membership, Loving and Owing" (1992-93) 95 W. Va. L. Rev. 275.

Minow, M., "Redefining Families: Who's In and Who's Out?" (1991) 62 U. Col. L. Rev. 269.

Nielsen, L., "Family Rights and the Registered Partnership in Denmark" (1990) 4 Int'l J.L. & Fam. 297.

Pedersen, M.H., "Denmark: Homosexual Marriages and New rules Regarding Separation and Divorce" (1991-92) 30 J. Fam. L. 290.

Rachels, J., "Why Privacy is Important" (1975), 4 Philosophy and Public Affairs 323.

Rogerson, C., "Couples or Individuals or Parents? Rethinking the Appropriate Unit for the Allocation of Social Benefits" (Conference on Domestic Partnerships, Faculty of Law, Queen's University, 21-23 October 1999). [unpublished]

Ryder, B., "Becoming Spouses: The Rights of Lesbian and Gay Couples" in *Family Law: Roles, Fairness and Equality* (Special Lectures of the Law Society of Upper Canada, 1993) (Scarborough, On.: Carswell, 1994) 399.

Smart, C., "Stories of Family Life: Cohabitation, Marriage and Social Change" (2000) 17:1 Can. J. Fam. L. 20.

Stewart, H., "Spousal Incompetency and the Charter" (1996) 34 Osgoode Hall L.J. 411.

Wakkary, A., "Assessing the Impact of Changing Marital Rights and Obligations: Practical C Considerations" (2000) 17:1 Can. J. Fam. L. 200.

Waaldijk, K., "Civil Developments: Patterns of Reform in the Legal Position of Same-Sex Partners in Europe" (2000) 17:1 Can. J. Fam. L. 62.

Young, C., "Taxing Times for Lesbians and Gay Men: Equality at What Cost?", (1994) 17 Dalhousie L.J. 534.

Young, C., "Spousal Status, Pension Benefits and Tax", (1998) 6 Can. Labour & Emp. L.J. 435.

Appendix A:

Origins and Evolution of Definitions of Common Law Spouses in Federal Legislation

Marital Model: Spouse and related terms referred to wives and, sometimes, husbands. Common law couples were not recognized. Before the 1950s, this was the dominant model (departed from only in the case of common law spouses of men in the armed forces in the *Pension Act* of 1919). Its dominance was eroded beginning in the 1950s in pension statutes. The definition of spouse as husbands and wives has been revived by Bill C-23 just as the exclusivity of marriage as a policy device has been rejected.

Model #1 (up to 1970s): Decision-makers had discretion to deem a woman to be a surviving widow if she established that she had "been maintained" and "publicly represented by the contributor as the spouse of the contributor" for seven years (if either the deceased or the claimant were married to someone else) or for an unspecified "number of years" (if neither was married).

Comment: This gender-specific definition of common law spouses responds to women's actual (not presumed) dependence. It creates a discretionary entitlement in contrast to the rights of wives. The onus is on the claimant to establish the relevant facts, which include a lengthy period of cohabitation. The definition reflects deep ambivalence about recognizing women in common law relationships at all.

Model #2 (1970s): Like model #1, the entitlement of common law cohabitants is discretionary. The dependency ("been maintained") requirement is dropped, and the number of years of required cohabitation is reduced to three if the contributor was married and one if not.

Comment: The entitlement is rendered gender neutral. The unstructured discretion of decision-makers and the onus on the claimant remains. This definition indicates a grudging move towards greater recognition of women (and men) living in opposite-sex relationships outside of marriage.

Model #3 (1970s-1990s): The duration of required cohabitation is reduced to one year in all cases. Public representation as husband and wife is required and the entitlement is discretionary.
Comment: Shorter period of cohabitation but discretionary nature of entitlement keeps common law spouses in a second-class legal position compared to married spouses.

Model #4 (1980s-1990s): A spouse is defined as a person of the opposite sex who is cohabiting with the contributor in a conjugal relationship at the time of the contributor's death, having so cohabited with the contributor for a continuous period of at least one year (in some statutes, the requirement of public representation as husband and wife is retained in place of the conjugal requirement).
Comment: The discretionary nature of the entitlement in the previous models is repealed. Entitlement now follows from recognition just as it does for married spouses. Represents a significant step forward in eliminating marital status discrimination.

Model #5 (1999-2000): This model was first adopted in the definition of survivor added to a number of pension statutes by the *Public Sector Pension Investment Board Act*, S.C. 1999, c.34. It was extended to most federal statutes dealing with the rights of spouses by the *Modernization of Benefits and Obligations Act*, 2000. As in the marital model, spouse is a term restricted to husbands and wives. Common law partners are included alongside spouses in federal statutes. "Common law partner" is defined as "a person who is cohabiting with the contributor in a conjugal relationship" at the time of the contributor's death, "having so cohabited with the contributor for a continuous period of at least one year."

Comment: Bill C-23 removes opposite sex common law couples from the definition of spouse in pension statutes and the *Income Tax Act*. It creates a new status of common law partner that has the effect of adding same-sex couples to federal statutes and extending the inclusion of opposite-sex common law couples beyond pension and tax laws. Model #5 represents a significant step forward in eliminating discrimination on the basis of marital status and sexual orientation in the distribution of burdens and benefits. However, its terminology is regressive.

YEAR THAT COMMON LAW SPOUSES INCLUDED IN CURRENT STATUTES PRIOR TO BILL C-23

Statute	Model #1	Model #2	Model #3	Model #4	Model #5
Canada Pension Plan[498]	1966	1974	1986		2000
Canadian Forces Superannuation Act[499]	1959	1975	1992		1999
Defence Services Pension Continuation Act[500]	1955	1975	1993		1999
Income Tax Act[501]				1993	2000
Members of Parliament Retiring Allowances Act[502] – M.P.s - P.M.				1995	1999 2000
Old Age Security Act[503] – spousal allowance – guaranteed income supplement		1975[504]		1985 1998	2000 2000

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[498] *Canada Pension Plan*, S.C. 1964-65, c.51, s.56; *An Act to amend the Canada Pension Plan*, 1974-75-76, c.4, s.30; R.S.C. 1985, c.30 (2nd Supp.), s.1; Bill C-23, s.42.

[499] *Canadian Forces Superannuation Act*, S.C. 1959, c.21, s.12(4); S.C. 1974-75-76, c.81, s.39(3); S.C. 1992, c. 46, s. 43; *Public Sector Pension Investment Board Act*, S.C. 1999, c.34.

[500] *Defence Services Pension Continuation Act*, S.C. 1955, c.28, s.15; S.C. 1974-75-76, c.81, s.51; S.C. 1992, c.46, s.86; *Public Sector Pension Investment Board Act*, S.C. 1999, c.34, s.207.

[501] S.C. 1994, c.7, Sch. VIII (1993, c.24), subsec. 140(3); Bill C-23, s.141.

[502] *Members of Parliament Retiring Allowances Act*, S.C. 1992, c. 46, s. 81; S.C. 1995, c.30, s.4 and s.13; *Public Sector Pension Investment Board Act*, S.C. 1999, c.34, s.224; Bill C-23, s.179.

Pension Act[505]	1919[506]	1975			2000
Pension Benefits Division Act[507]				1992	2000
Pension Benefits Standards Act[508]				1986	2000
Public Service Superannuation Act[509]	1953	1975	1992		1999
Royal Canadian Mounted Police Pension Continuation Act[510]			1992		1999
Royal Canadian Mounted Police Superannuation Act[511]	1959	1975	1992		1999
War Veterans Allowance Act[512]	1961	1974	1990		2000[513]

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[503] *Old Age Security Act*, R.S.C. 1985, c.O-9; S.C. 1974-75-76, c.58, s.1(2); R.S.C. 1985, c.34 (1st supp.), s.1(1); S.C. 1998, c.21, ss.108-11; Bill C-23, s.192.

[504] Unlike other uses of model #2, the 1975 *Old Age Security Act* definition gave rise to an automatic entitlement.

[505] *Pension Act*, S.C.1919, c.43, s.33(3); S.C. 1970-71-72, c.22 (2nd supp.), s.1(2); S.C. 1974-75-76, c.66, s.14; S.C. 1980-81-82-83, c.19, s.14(4); S.C. 1990, c.43, s.21; S.C. 1995, c.18, s.64; Bill C-23, s.211.

[506] The 1919 *Pension Act*, and 1980 and 2000 amendments to the Act, do not fit the models neatly, since they all require cohabitation for an unspecified "reasonable time" and the entitlement remains discretionary throughout.

[507] *Pension Benefits Division Act*, S.C. 1992, c. 46; Bill C-23, s.243.

[508] *Pension Benefits Standards Act, 1985*, R.S.C. 1985, c. 32 (2nd Supp.), s.2(1); Bill C-23, s.254(1).

[509] *Public Service Superannuation Act*, S.C. 1952-53, c.47, s.12(4); 1974-75-76, c.81, s.9; S.C. 1992, c.46, s.13; *Public Sector Pension Investment Board Act*, S.C. 1999, c.34, s.53.

[510] *Royal Canadian Mounted Police Pension Continuation Act*, R.S.C. 1970, c. R-10; S.C. 1992, c.46, s.91; *Public Sector Pension Investment Board Act*, S.C. 1999, c.34, s.216.

[511] *Royal Canadian Mounted Police Superannuation Act*, S.C. 1959, c.34, s.13(4); 1974-75-76, c.81, s.60; S.C. 1992, c. 46, s. 72; *Public Sector Pension Investment Board Act*, S.C. 1999, c.34, s.169(2).

[512] *War Veterans Allowance Act*, S.C. 1961, c.39, s.2(3); S.C. 1974, c.8, s.3(7); S.C. 1975, c.66, s.24; S.C. 1990, c.43, s.32(6); Bill C-23, s.317(10).

[513] The reform of the *War Veterans Allowance Act* has consistently lagged behind the other federal pension statutes. The entitlement of common law spouses has remained discretionary, although this will no longer be the case if Bill C-23 is enacted (dropped by the other statutes when they adopted model #4). Remarriage by a common law partner still terminates entitlement (even after Bill C-23), although this is no longer the case in the other pension statutes.

Appendix B

Summary of Amendments to Federal Statutes in Bill C-23, the *Modernization of Benefits and Obligations Act*

1. Statutory provisions that previously applied to married spouses only, that after Bill C-23 will apply to married spouses and common law partners

Statute	Section	Bill C-23 section
Bank Act	s.283(1)(e) associate of the offeror includes spouse	s.4
Bank Act	s.486(1) related party includes spouse	s.7
Bank Act	s.496(5) and (6) when loans to spouses of senior officers permitted	s.5
Bank Act	s.675(3) fine should reflect proceeds of offence received by spouse or other dependant	s.6
Bankruptcy and Insolvency Act	s.4(2) "related persons" includes marriage	s.9
Bankruptcy and Insolvency Act	s.113(3) spouse of bankrupt cannot vote for trustee or inspectors	s.13
Bankruptcy and Insolvency Act	s.121(4) spousal support a provable claim, not released by discharge	s.14
Bankruptcy and Insolvency Act	s.137(2) spouse or former spouse cannot claim wages before other creditors	s.15
Bankruptcy and Insolvency Act	s.138 family claims (including married spouses) for wages cannot be preferred	s.16
Bankruptcy and Insolvency Act	s.178(1) discharge in bankruptcy does not release the bankrupt from liability for spousal or child support	s.18
Business Development Bank of Canada Act	s.31 "interested person" includes spouse	s.26

Canada Business Corporations Act	s.2(1) defines "associate" as including spouse	s.27
Canadian Cooperatives Act	s.2(1) defines "associate" as including spouse	s.28
Canada Corporations Act	s.100(1) defines "associate" as including spouse	s.29
Canada Elections Act	s.15(1) anti-nepotism clause prohibits hiring of spouse	s.31
Carriage by Air Act	sch. 2, s.1 relational tort claim; includes liability to husband or wife	s.73
Citizenship Act	s.5(1.1)	s.74, s.75
Cooperative Credit Associations Act	s.410(1)(c) related party includes spouse	s.86
Cooperative Credit Associations Act	s.466(3) fine should reflect proceeds of offence received by spouse or other dependant	s.85
Corporations Returns Act	s.2(1) related group includes marriage	s.87
Criminal Code	s.215 duty to provide necessaries to spouse	s.93
Criminal Code	s.423(1) intimidation through threats to spouse an offence	s.95
Criminal Code	s.718.2 spousal abuse a factor in sentencing	s.95
Criminal Code	s.738(1) restitution order may include moving expenses of A "spouse" and member of household if harmed or threatened	s.95
Criminal Code	s.810 may lay an information when fear of harm to spouse	s.95
Customs Act	s.45(3)(a) "related persons" includes marriage	s.96
Diplomatic Service (Special) Superannuation Act	s.5(9) death benefit to spouse	s.100
Excise Tax Act	s.2(2.2) references definition in *Income Tax Act*	s.140, Sch.2, s.10
Excise Tax Act	s.325 transactions between spouses not arm's length	s.112, Sch.1, s.1
Governor General's Act	s.7, s.8 death benefit to spouse	s.127, s.128
Insurance Companies Act	s.307(1)(d) associate of the offeror includes spouse	s.154
Insurance Companies Act	s.518(1) related party includes spouse	s.158
Insurance Companies Act	s.529 when loans to spouses of senior officers permitted	s.155

Insurance Companies Act	s.706(3) fine should reflect proceeds of offence received by spouse or other dependant	s.157
Judges Act	s.40 moving expenses for surviving spouse	s.160
Judges Act	s.44, ss.46-9 survivor benefits to spouse	ss.162-7
Lieutenant Governors Superannuation Act	s.2 definition of survivor added	s.170
Lieutenant Governors Superannuation Act	ss.7-9 survivor benefits to spouse	ss.171-5
Members of Parliament Retiring Allowances Act	s.49 survival benefits to spouse of former Prime Minister	s.180
Special Import Measures Act	s.2(3) related persons includes married persons	s.291
Trust and Loan Companies Act	s.288(1) associate of the offeror includes spouse	s.299
Trust and Loan Companies Act	s.474(1) related party includes spouse	s.302
Trust and Loan Companies Act	s.484 when loans to spouses of senior officers permitted	s.300
Trust and Loan Companies Act	s.534(3) fine should reflect proceeds of offence received by spouse or other dependant	s.301

2. Statutory provisions that previously applied to married spouses and common law heterosexual couples, that after Bill C-23 will apply to married spouses and common law partners

Statute	Section	Bill C-23 section
Agricultural Marketing Program Act	s.3(2) presumption against arm's length transactions if 'cohabiting' or married	s.2 adds common law partners
Canada Pension Plan	amended to include common law partners throughout	s.42-65
Employment Insurance Act	s.5 employment not insurable if not at arm's length	sch.2, s.10
Income Tax Act	amended to restrict spouse to married persons, and to include common law partners throughout	ss.130-146, Schedule 2
Old Age Security Act	s.12 calculation of entitlement to guaranteed income supplement	s.207
Old Age Security Act	Entitlement to spousal allowance	ss.195-202
Pension Act	Survivor benefit's to spouse	ss.212-240
Pension Benefits Division Act	Amended to include common law partners throughout	ss.243-253
Pension Benefits Standards Act	s.2(1) spouse redefined to remove common law couples; definition of common law partner added, and implemented throughout the Act	ss.254-264
War Veterans Allowance Act	s.2(1) spouse redefined to remove common law couples; definition of common law partner added, and implemented throughout the Act	ss.317-337

3. Statutory provisions that apply to married spouses and common law partners that will not be amended by Bill C-23

Statute	Section
1. *Canadian Forces Superannuation Act*	see definition of survivor in s.29(1) enacted by *Public Sector Pension Investment Board Act*, S.C. 1999, c.34, s.136
2. *Defence Services Pension Continuation Act*	see definition of survivor in s.32(1) enacted by *Public Sector Pension Investment Board Act*, S.C. 1999, c.34, s.214
3. *Members of Parliament Retiring Allowances Act*	see definition of survivor in s.2(1) enacted by *Public Sector Pension Investment Board Act*, S.C. 1999, c.34, s.224
4. *Public Service Superannuation Act*	see definition of survivor in s.25(4) enacted by *Public Sector Pension Investment Board Act*, S.C. 1999, c.34, s.75
5. *Royal Canadian Mounted Police Pension Continuation Act*	see definition of survivor in s.25.1 enacted by *Public Sector Pension Investment Board Act*, S.C. 1999, c.34, s.222
6. *Royal Canadian Mounted Police Superannuation Act*	see definition of survivor in s.18(1) enacted by *Public Sector Pension Investment Board Act*, S.C. 1999, c.34, s.185

4. Statutory provisions that apply only to married spouses that will not be amended by Bill C-23

Statute	Section
Canada Evidence Act	s.4 rules regarding competence and compellability of spouses, and marital communications privilege
Canada Shipping Act	s.645 dependants entitled to bring wrongful death action for maritime tort includes A 'wife, husband'
Canada Shipping Act	schedule 6, c.1, art. 3 claims by 'dependants' of employees governed by contract
Criminal Code	s.159(2) married persons under the age of 18 are exempt from the anal intercourse offence
Criminal Code	s.307(2) defamatory libel can extend to statements made in debates of House of Commons regarding marriage or divorce
Employment Insurance Act	s.133 subject to privilege in s.4(3) of Canada Evidence Act, spouse is competent and compellable regarding offence of false statement
Immigration Act	s.2(1) dependant includes spouse; member of family class includes spouse and fiancé(e) s.6(1) immigrant who meets all selection standards and dependants entitled to landing s.6(2) sponsorship of family class
Special Retirement Arrangement Act	s.22
Young Offenders Act	s.9(4) notice of arrest and detention of young offender may go to married spouse instead of parent

5. Statutory provisions that use other household, family or relational definitions that will be amended by Bill C-23

Statute	Section	Bill C-23 section
Agricultural Marketing Programs Act	s.3(2) if cohabiting or related by blood, adoption, marriage, presumed to be not at arm's length unless proven to the contrary	ss.2-3: presumption extended to CLPs
Bank Act	s.283(1)(f) associate includes 'relative' with 'same residence'	s.4 adds CLPs
Business Development Bank of Canada Act	s.33 applicant must disclose 'interested person'; Board approval of assistance necessary	s.26 adds CLPs
Canada Business Corporations Act	s.2(1)(f) associate includes 'relative' with 'same residence'	s.27 adds CLPs
Canada Cooperatives Act	s.2(1) associate includes 'relative' with 'same residence'	s.28 adds CLPs
Canada Corporations Act	s.100(1) associate includes 'relative' with 'same residence'	s.29 adds CLPs
Insurance Companies Act	s.307(1)(f) associate includes 'relative' with 'same residence'	s.154 adds CLPs
Trust and Loan Companies Act	s.288(1)(f) associate includes 'relative' with 'same residence'	s.299 adds CLPs
Visiting Forces Act	s.2 definition of dependant replaced; now defined as 'a person who forms part of a member's household and depends on the member for support'	s.316

6. Statutory provisions that use other household, family or relational definitions that will not be amended by Bill C-23

Statute	Section
Canada Labour Code	s.210(1) bereavement leave entitlement on death of employee's 'immediate family' member
Corrections and Conditional Release Act	s.71(1) in order to promote relationships, reasonable contact, including visits with 'family, friends and other persons', should be encouraged
Criminal Code	s.91(5), s.94(5), s.113(1) exemption to firearms offences if used 'to sustain the person's family'
Criminal Code	s.121(1) bribery includes offer to 'any member of [an official's] family'
Criminal Code	s.186(2) can wiretap solicitor's residence if 'member of the household' is suspected of criminal activity
Criminal Code	s.264(2) criminal harassment includes threatening 'any member of their family'
Criminal Code	s.423(1) intimidation aimed at 'relatives' is an offence
Criminal Code	s.632 judge can excuse juror who has 'relationship' with accused (not defined)
Criminal Code	s.738(1) restitution order may be made to cover moving expenses if 'any member of the household' harmed or threatened
Excise Act	s.176(1) exemption for brewing beer for family consumption
Excise Act	s.227 exemption for tobacco 'for use of family' on farm
Firearms Act	s.112(2) exemption to offence if used to sustain the person's family
Investment Canada Act	s.3 'voting group' includes 2 or more persons in a 'personal relationship' who 'would ordinarily be expected to act together'
National Defence Act	s.117 offence to receive gifts etc. 'by or through any member of his family'
Special Import Measures Act	s.2 question of fact whether persons not related to each other were at 'arm's length'; irrebutable presumption that related persons are not
Territorial Lands Act	s.20(4) eviction order can require removal of 'all members of that person's family'

Witness Protection Program Act	s.2 'witness' means a person who may require protection 'because of their relationship or association' with a witness
Young Offenders Act	s.16.2, s.24.1, s.26.2 sentencing should take into account accessibility to 'family'

7. Statutory provisions that previously employed relational terms that will be repealed by (or use of relational terms removed by) Bill C-23

Statute	Section	Bill C-23 section
Bankruptcy and Insolvency Act	s.91(3) settlements made within one year of bankruptcy void unless made before and in consideration of marriage	s.11 repealed
Bankruptcy and Insolvency Act	s.92 covenants or contracts made in consideration of marriage	s.12 repealed
Bankruptcy and Insolvency Act	s.93 payments of money that are void against the trustee	s.12 repealed
Bankruptcy and Insolvency Act	s.177 transactions made in consideration of marriage	s.17 repealed
Bridges Act	s.14 liability to any person including the wife or husband	s.25 relational terms deleted
Criminal Code	s.23(2) married persons cannot be accessories after the fact for providing comfort, assisting escape	s.92 repealed
Criminal Code	s.329(1) theft does not apply to property of cohabiting husband and wife	s.94 repealed